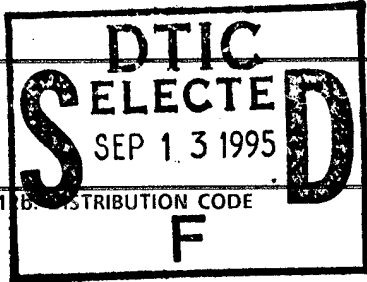


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**United States' Criminal Jurisdiction Over  
Environmental Offenses Committed by Its Forces Overseas:  
How to Maximize and When to Say "No"**

By

Mark Richard Ruppert

B.A. June 1978, University of Cincinnati  
J.D. June 1981, The Ohio State University

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The National Law Center

of The George Washington University  
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for the degree of Master of Laws

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# United States' Criminal Jurisdiction Over Environmental Offenses Committed by Its Forces Overseas: How to Maximize and When to Say "No"

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**Appendix A: Italy Final Governing Standards, Chapter 6, Hazardous Waste**

## I. Introduction

United States (U.S.) forces<sup>1</sup> stationed overseas are a relatively permanent feature of modern American national security policy, and despite recent military cutbacks<sup>2</sup>, the stationing of those forces in another sovereign's territory<sup>3</sup> will continue to pose legal challenges regarding the status of these forces. One challenge in particular will no doubt be the continuing viability of the U.S. policy to maximize its criminal jurisdiction over U.S. forces committing environmental offenses while stationed in a host sovereign's territory. The basis for this practice, that for the most part reverses customary international law, has been treaties known as Status of Forces Agreements (SOFAs), entered into between the United

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<sup>1</sup> Throughout this article, the term "forces" describes active duty members of the United States military services and civilian employees of these services.

<sup>2</sup> For example, as the number of active duty personnel in the Department of Defense (DOD) declined from 2,138,213 in 1988 to 1,610,490 in 1994, the total number of active duty military personnel assigned overseas disproportionately declined from 458,446 in 1988 to 251,122 in 1994. *See* DOD Selected Manpower Statistics for Fiscal Year 1994, Table 2-16 (Sep. 30, 1994).

<sup>3</sup> The following countries make available significant military installations for use by the U.S. where U.S. forces maintain a significant presence: Germany, Japan, Korea, the United Kingdom, and Italy. *See* DOD Worldwide Manpower Distribution by Geographical Area, Table 309 (Sep. 30, 1994). U.S. forces also maintain a sizeable presence at host nation provided installations Greece, Iceland, The Netherlands, Portugal (Azores), Spain, Turkey, Australia, Bermuda, Canada, Cuba, Diego Garcia, Greenland, and Panama. *Id.* The number of overseas installations that continue to be used by United States forces is shrinking due to overseas base "closures" (turning installations back over to host nations) driven by the study mandated in Section 206(b) of the Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988). As overseas installations are turned over to host nations, however, remaining overseas installations used by United States forces are subject to a heavy influx of temporarily assigned forces in the wake of a decreased "permanent" presence and a steady increase since 1990 of increased overseas deployments for exercises and real world combat operations. *See* Robert S. Dudley, *Size Down, Work Up*, AIR FORCE MAGAZINE, Jan. 1995, at 12.

States and most countries where there exists a substantial presence of U.S. forces stationed on a "permanent" basis. Perhaps of greater significance has been the practice that has grown up under these treaties whereby the U.S. successfully seeks waiver of host nation criminal jurisdiction in the great majority of cases, to include a significant number of cases involving civilians where the U.S. has no criminal jurisdiction at all.

This accommodating relationship among allies has on occasion broken down when the politics of sovereignty have "intruded" upon it. Emerging sovereignty attitudes among nations hosting U.S. forces (as the threat of hostilities diminishes) and recent international environmental incidents, creating increasing sensitivity to the environment and visiting U.S. forces' treatment of it, have contributed to U.S. Department of Defense (DOD) efforts to revise its policies on environmental compliance at overseas installations by U.S. forces. As host nation environmental legislation (including criminal enforcement) catches up with and in some cases overtakes the scope and complexity of the U.S. environmental law regime (not directly applicable to U.S. forces overseas), U.S. authorities have apparently not considered the contemporaneously widening gulf between their pervasive practice of maximizing foreign jurisdiction waivers and the ever increasing tempo and seriousness of host nation criminal enforcement for environmental noncompliance. This gap appears alarmingly wide when reviewing the few environmental offense cases that have occurred thus far and the U.S. disposition of those cases after securing (or, more likely, simply assuming) jurisdiction.

This paper seeks to focus on the inherent tension between the DOD policy to maximize U.S. criminal jurisdiction over its forces stationed overseas and growing pressure on host nation allies to respond to environmental noncompliance, as well as to the actual or

perceived lenient treatment of visiting forces committing environmental offenses. This paper then suggests improved means by which U.S. authorities may continue credibly seeking maximum waiver of jurisdiction over environmental offenses committed by U.S. forces in the future, and briefly evaluates the need to persevere with this policy in the context of U.S. civilians committing these offenses.



## II. Foreign Criminal Jurisdiction and Status of Forces Agreements

### A. International Law Foundation

Customary international law<sup>4</sup> is generally inadequate to deal with the question of criminal jurisdiction over visiting forces when both the host nation and sending nation<sup>5</sup> assert jurisdiction over an offender.<sup>6</sup> On the one hand, it appears clear that in the absence of a special agreement, nations as sovereigns may exercise criminal jurisdiction over all persons within their territory, including foreign military forces.<sup>7</sup> On the other hand, the sending State arguably has an equally compelling sovereign interest in exercising control (through criminal jurisdiction) of its military forces in another sovereign's territory.<sup>8</sup> Application of this sovereignty interest and immunity from host nation jurisdiction had been perfected in

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<sup>4</sup> Customary international law is defined as "a general practice accepted as law." J. BRIERLY, *THE LAW OF NATIONS* 60 (6th ed. 1963).

<sup>5</sup> The meaning of "sending," "host," and "receiving" nations or States is illustrated by the following example. When the U.S. deploys forces to be stationed in the territory of Germany, the U.S. is the sending State, and Germany is the receiving or host State.

<sup>6</sup> S. LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* 9 (1971). The classic controversy arises primarily over which nation has the right to first exercise jurisdiction over the offending member of the visiting force.

<sup>7</sup> G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 84 (1941). *See also* The Case of the S.S. Lotus, P.C.I.J., Ser. A, No. 10 (1927). This general rule assumes the absence of armed conflict in enemy or occupied territory when sending State forces are immune from local criminal jurisdiction. LAZAREFF *supra* note 4, at 13.

<sup>8</sup> The dilemma in resolving this conflict in competing sovereign interests has been repeatedly discussed by commentators. *See, e.g., Criminal Jurisdiction Over American Armed Forces Abroad*, 70 HARV. L. REV. 1043, 1046 n.22 (1957).

the "Law of the Flag" theory.<sup>9</sup> Law of the Flag advocates have cited *The Schooner Exchange v. McFaddon*<sup>10</sup> as authority for their position that sending State forces are immune from jurisdiction of a foreign receiving State.<sup>11</sup> This "immunity" was extended to U.S. forces stationed in (not just passing through) a foreign country in later *dicta*.<sup>12</sup> Careful analysis of Chief Justice Marshall's opinion reveals that any such immunity of sending State forces from foreign criminal jurisdiction is wholly dependent on the nature and extent of the host nation's consent to be restricted in the application of its own criminal jurisdiction.<sup>13</sup> Nonetheless, customary international law had evolved to the point where license to enter foreign territory carried with it the right to exercise military criminal jurisdiction free from the territorial

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<sup>9</sup> The basis for such jurisdiction is that a member of the sending State forces is a representative of his sovereign, and as such, is thus accountable only under the "law of the flag" of the sending State. Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 U.S. NAVAL WAR C. INTL L. STUDIES 8 (1965).

<sup>10</sup> 11 U.S. (7 Cranch) 116 (1812).

<sup>11</sup> S. LAZAREFF, *supra* note 6, at 15. The often cited *dicta* by Chief Justice Marshall states that, "The grant of a free passage [through a foreign nation], therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which his army may require." *The Schooner Exchange*, 11 U.S. (7 Cranch) at 139.

<sup>12</sup> *Dow v. Johnson*, 100 U.S. 158, 165 (1879); *Coleman v. Tennessee*, 97 U.S. 509, 516 (1878).

<sup>13</sup> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself....[A]ll exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself....This consent may be either express or implied." *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

sovereign's interference.<sup>14</sup>

Until the post-World War II era of negotiated SOFAs addressing this conflict between sovereigns, United States policy was to rely heavily on the concept of immunity from host nation criminal jurisdiction created by the host nation's implied consent in expressly consenting to U.S. forces being stationed there.<sup>15</sup> The American policy of insisting on complete immunity from foreign criminal jurisdiction continued in the early postwar period,<sup>16</sup> but ultimately gave way to the negotiation of systems of "concurrent jurisdiction"<sup>17</sup> in SOFAs and bilateral supplementary agreements.<sup>18</sup>

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<sup>14</sup> Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV.169, 171 (1994).

<sup>15</sup> S. LAZAREFF, *supra* note 6, at 21-28. *See, e.g.*, Agreement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Respecting Criminal Jurisdiction Over Criminal Offenses Committed by Armed Forces, July 27, 1942, 57 STAT. 1193, E.A.S. No. 355 (showing Britain's accession to American demands that the U.S. be given complete jurisdiction over its forces). *See also* Department of Defense Response to Inquiry from the Government of Australia, *reprinted in* 58 AM. J. INT'L L. 994 (1964).

<sup>16</sup> *See, e.g.*, *Hearings on H.J. Res. 309 and Similar Measures Before the House Committee on Foreign Affairs*, 84th Cong., 1st Sess. (1954), at 349. The 1951 *Manual for Courts-Martial* asserted that criminal jurisdiction over American forces "remains" in the United States under international law. *Criminal Jurisdiction Over American Armed Forces Abroad*, *supra* note 8, at 1049 n.42.

<sup>17</sup> Concurrent jurisdiction as that term is expressed in customary international law and SOFA provisions refers to an offense by a member of the visiting force violating both the laws of the sending and receiving States.

<sup>18</sup> Several developments facilitated this change. Forces were henceforth to be permanently, not temporarily, stationed overseas. A restrictive theory of sovereign immunity, such that sovereign or public acts, but not private acts, would be given sovereign immunity, was adopted by the U.S. State Department. 26 DEPT ST. BULL. 984-985 (1952) (the "Tate Letter"). During the North Atlantic Treaty Organization (NATO) SOFA Congressional hearings, the Departments of State and Justice took the position that there

## B. Status of Forces Agreements and Jurisdictional Allocations

### 1. SOFA Intent

In the wake of nations and commentators disagreeing on the immunity of a sending State's forces from a host nation's criminal jurisdiction, the predominant focus of the NATO SOFA<sup>19</sup> was the issue of allocation of criminal jurisdiction and sharing of this sovereign prerogative.<sup>20</sup> The drafters' solution to the sovereignty conflict was to distinguish between offenses involving the exclusive jurisdiction of either state and the concurrent jurisdiction of both states.<sup>21</sup> In the case of concurrent jurisdiction, the primary right of jurisdiction is granted to the receiving State, except for offenses solely against the property, security, or members of the sending State force, or offenses arising out of the performance of official

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existed no implied immunity from the criminal jurisdiction of local courts under international law. *Hearing before the Committee on Foreign Relations on the Status of North Atlantic Treaty Organization, Armed Forces, and Military Headquarters*, 83d Cong., 1st Sess. (1953) at 29 [hereinafter *Foreign Relations Committee Hearings*]. DEPARTMENT OF JUSTICE MEMORANDUM ON INTERNATIONAL LAW AND THE STATUS OF FORCES AGREEMENT, *reprinted in Supplementary Hearings before the Senate Comm. on Foreign Relations on Status of Forces of the North Atlantic Treaty*, 83d Cong., 1st Sess. (1953), at 38-56.

<sup>19</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, Jun. 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

<sup>20</sup> Mark D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 95 (1988). Permanently stationing U.S. forces overseas in peacetime under a general rule of international law subjecting them fully to host nation jurisdiction is not acceptable for political reasons, as well as the need to exercise consistent military discipline over the force. See Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 140 (1994).

<sup>21</sup> NATO SOFA, *supra* note 19, Article VII, paras. 1-3.

duty.<sup>22</sup> This approach thus recognizes both the territorial sovereignty of the receiving state as well as the "law of the flag" principle.<sup>23</sup>

Despite this compromise in SOFAs,<sup>24</sup> one must remember that these allocations of concurrent criminal jurisdiction presuppose the consent of the receiving State to any sending State jurisdiction, while at the same time eliminating virtually any notion of sending State force immunity.<sup>25</sup> The few court cases addressing this allocation necessarily acknowledge that SOFA waivers of host nation criminal jurisdiction and explicit qualifications of consent to sending State jurisdiction are narrowly interpreted to maintain primary host nation jurisdiction (and thus the integrity of that host nation's sovereignty) when a criminal defendant challenges such jurisdiction.<sup>26</sup>

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<sup>22</sup> *Id.* at para. 3.

<sup>23</sup> Welton, *supra* note 20.

<sup>24</sup> The NATO SOFA is the blueprint for subsequent agreements which generally follow its allocation of jurisdiction scheme. *See, e.g.*, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes, Jan. 19, 1960, 11 U.S.T. 1652, 373 U.N.T.S. 248 [hereinafter Japan SOFA], Article XVII; Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea with Agreed Minutes, Agreed Understandings, Exchange of Letters and Other Implementing Agreements, Jul. 9, 1966, 17 U.S.T. 1677, 674 U.N.T.S. 163 [hereinafter Korea SOFA], Article XXII.

<sup>25</sup> GEORGE STAMBUK, AMERICAN MILITARY FORCES ABROAD 52 (1963). *See also* G.I.A.D. DRAPER, CIVILIANS AND THE NATO STATUS OF FORCES AGREEMENT 12-13 (1966).

<sup>26</sup> *E.g.*, Smallwood v. Clifford, 286 F.Supp. 97, 100-102 (D.D.C. 1968), *judgment vacated as moot*, No. 22,053 (D.C. Cir. May 14, 1969). *See also* United States v. Murphy, 18 M.J. 220 (C.M.A. 1984).

## 2. Jurisdiction Allocation Formula

To understand the potential application of U.S. jurisdiction over environmental offenses committed by its forces in host nations, a brief explanation of the specific allocation of criminal jurisdiction using NATO SOFA Article VII is needed. Paragraph 1 sets forth the basic guidelines for the exercise of concurrent jurisdiction.<sup>27</sup> The language immediately raises the question of whether the U.S. could attempt to exercise concurrent jurisdiction over U.S. civilian employees.<sup>28</sup> Having established the fundamental concession that sending States may at least exercise some criminal jurisdiction within receiving States, the SOFA

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<sup>27</sup> 1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.

NATO SOFA, *supra* note 19, at 1798.

<sup>28</sup> As a general rule today, the U.S. as a sending State under a SOFA jurisdictional allocation may only exercise criminal jurisdiction over its military members. *See* Section III.A.3., *infra*.

then defines the contours of exclusive<sup>29</sup> and concurrent jurisdiction.<sup>30</sup> Paragraph 3 fills in the gap in international law regarding which nation has priority to prosecute when concurrent jurisdiction exists.<sup>31</sup> Of particular interest in the area of environmental offenses is the official duty exception to the host nation's primary right to exercise jurisdiction when a member of the force commits an offense under sending and receiving State laws arising out of the

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<sup>29</sup> Paragraph 2 of Article VII provides in part:

(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses...punishable by its law but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offenses...punishable by its law but not by the law of the sending State.

NATO SOFA, *supra* note 19. Given the international growth in environmental sensitivity and burgeoning legislation (*see infra* Sections III.B.3. and IV), it is difficult to conceive of many case where the U.S. would have exclusive jurisdiction over forces committing environmental offenses.

<sup>30</sup> Paragraph 3 of Article VII allocates primary concurrent jurisdiction as follows:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or a civilian component in relation to

(I) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.

© If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

*Id.*

<sup>31</sup> S. LAZAREFF, *supra* note 6, at 160.

performance of his duties.<sup>32</sup> Although not stated in the SOFA itself, according to a government legal advisor closely involved with the NATO SOFA negotiations, the criterion for distribution of cases of concurrent jurisdiction is one of "predominant interest."<sup>33</sup> Some have also suggested that the primary right scheme of allocating concurrent jurisdiction has eschewed doctrine and theory, and relied instead on conceptions of good faith, reasonableness, and efficacy.<sup>34</sup>

Recognition of these interests is codified in the NATO SOFA, Article VII, Paragraph 3(c), allowing sending and receiving States to change the primary right to exercise concurrent jurisdiction on an *ad hoc* basis.<sup>35</sup> The only obligation of a host nation with the primary right to exercise concurrent jurisdiction receiving such a request (i.e., to waive the host nation's primary right of jurisdiction) is to give "sympathetic consideration" to the sending State's request for a waiver.<sup>36</sup> In practice, however, many SOFA signatory receiving

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<sup>32</sup> This exception's application over the years and in the newer context of environmental violations is fraught with uncertainty. *See infra* Section V.A. The other exception, known as the *inter se* exception, is not addressed herein since its application would likely be rare in the instance of most environmental violations affecting the host nation's property (the installation itself used by U.S. forces), or host nation personnel. *See* JOSEPH M. SNEE & KENNETH A. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 55 (1957).

<sup>33</sup> *See* JOHN WOODLIFFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 178 (1992). *See also* S. LAZAREFF, *supra* note 6, at 170.

<sup>34</sup> *See, e.g.,* G. DRAPER, *supra* note 25, at 14. This has been a prevailing practice between the U.S. and several SOFA signatories.

<sup>35</sup> Lepper, *supra* note 14, at 176.

<sup>36</sup> *See also* Japan SOFA, *supra* note 24, Article XVII, Paragraph 3(c); Korea SOFA, *supra* note 24, Article XXII, Paragraph 3(c).



States, even in recent years, have acceded to U.S. requests for waivers in a significant number of cases.<sup>37</sup> It has been suggested that the U.S. policy of successfully requesting waivers wherever possible has led to the result that American forces are in fact "extraterritorial" (and *de facto* following law of the flag principles), rather than subject to foreign criminal jurisdiction (with certain exceptions).<sup>38</sup> The question remains whether in cases involving environmental offenses (particularly in contentious cases capturing the attention of the host nation's citizens), the U.S. would be successful in requesting a waiver to prosecute a military member (or in the case of official duty whether the U.S. could successfully assert its primary right).<sup>39</sup> Even less certain is the U.S. ability to request host

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<sup>37</sup> For example, during the period from Dec. 1, 1993 to Nov. 30, 1994, the total number of U.S. military members subject to primary foreign jurisdiction was 5,840, and a waiver was obtained by the U.S. in 4,492 cases (or 89%). The bulk of these numbers occurred in Germany (3,890) where the waiver rate was 99.9%. The waiver rate in other countries was Korea - 97%, Italy - 50.3%, Japan - 34.9%, and United Kingdom - 30.7%. Release to the U.S. of civilians subject to exclusive foreign jurisdiction was 22.5% worldwide, with the majority of cases occurring in Germany (1,153 of 1,646). DOD Report, Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel (1 Dec 1993 - 30 Nov 1994) (prepared by the Department of the Army Office of the Judge Advocate General as DOD's Executive Agent).

<sup>38</sup> G. STAMBUK, *supra* note 25, at 110-111. U.S. military authorities have advanced several explanations for American success in securing waivers: growing confidence of host nation prosecutors and courts in the U.S. military justice system; better sending state-receiving state communications in these matters; the perception that U.S. military authorities deal more firmly with offenders than local courts; and the natural desire of receiving states to conserve judicial and law enforcement resources. United States Army, Europe & 7th Army, International Affairs Division, Recall Rate, Ten-Year Analysis: 1977-1986 (1986), *cited in* Davis, *Waiver and Recall of Primary Concurrent Jurisdiction in Germany*, The Army Lawyer, May 1988, at 30.

<sup>39</sup> See *infra* Section II.D. for a discussion of contentious death penalty cases changing the rules and practice of primary concurrent jurisdiction. See *infra* Section V.A. for a discussion of environmental offenses styled as official duty cases.

nation "waivers" in civilian cases which, although occurring,<sup>40</sup> are not entitled to "sympathetic consideration" due to the absence of concurrent military criminal jurisdiction.<sup>41</sup>

### C. U.S. Policy to Maximize Its Sending State Jurisdiction

#### 1. Individual Cases

U.S. military policy on maximizing its jurisdiction to the greatest extent possible stems from its interpretation from the Senate Resolution on the NATO SOFA.<sup>42</sup> The Senate declaration, adopted on July 15, 1953, did not expressly require the U.S. to obtain jurisdiction in all cases, but instead required a compulsory waiver request only when the offender's commander believed "there is danger that the accused will not be protected because of the absence or denial of Constitutional rights he would enjoy in the United States."<sup>43</sup> From this mandate (and since the outset of SOFA practice) grew the U.S. policy to secure jurisdiction whenever possible in cases involving the receiving State having the primary right of jurisdiction.<sup>44</sup> Even a few courts have expressed a preference for trial by

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<sup>40</sup> Despite the lack of U.S. military criminal jurisdiction over civilian employees, U.S. military authorities have the authority to request host nation release of civilian cases where administrative sanctions provide a suitable corrective action. Army Reg. 27-50/SECNAVINST 5820.4G/Air Force Reg. 110-12 (Jan. 14, 1990), Status of Forces Policies, Procedures, and Information, para. 1-7(b) (on file with U.S. Army, Navy and Air Force Offices of The Judge Advocate General) [hereinafter SOFA Tri-Service Regulation]. See discussion at Section VI.A., *infra*.

<sup>41</sup> J. SNEE & K. PYE, *supra* note 32, at 30-31.

<sup>42</sup> Senate Res., Ratification with Reservations, NATO SOFA, *supra* note 19, at 1828.

<sup>43</sup> *Id.*

<sup>44</sup> The Department of Defense implemented the Senate's mandate in Department of Defense Directive 5525.1, Status of Forces Policies and Information (Jan. 20, 1966). Its standards and procedures are reproduced in the SOFA Tri-Service Regulation, *supra* note

court-martial of military personnel overseas as opposed to trial in foreign courts.<sup>45</sup>

## 2. Blanket Waivers

Although the negotiation of a waiver on a case by case basis is the most common method to maximize jurisdiction, the second prong of American strategy to do so has been through the negotiation of bilateral agreements that invert the system of priorities by granting to the U.S. a general waiver of the receiving State's primary right.<sup>46</sup> One type of bilateral agreement negotiated with the Netherlands requires a blanket waiver of its primary right upon request of U.S. authorities except in cases where the Netherlands determines it is of

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40. The regulation seems to extend the Senate's desire by providing that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities that will maximize U.S. jurisdiction to the extent permitted by applicable agreements." *Id.* at para 1-7(a). The Judge Advocate General of the Air Force has recited another major reason behind this policy as the need to maintain morale and discipline in the armed forces. Letter from The Judge Advocate General to Staff Judge Advocates (Sep. 12, 1974), *cited in* Air Force Pamphlet 110-3, Civil Law, paragraph 19-17b, n. 92 (Dec. 11, 1987) [hereinafter AFP 110-3] (on file with the International and Operations Law Division, Office of the Judge Advocate General, U.S. Air Force). This policy to maximize jurisdiction has generally been codified by Military Country Representatives. *See, e.g.*, U.S. Sending State Office for Italy Instruction 5820.1B, Operating Procedures in Italy Under Article VII, NATO Status of Forces Agreement (Feb. 23, 1994) (on file with the U.S. Sending State Office, Rome, Italy), providing that waivers of primary and exclusive Italian jurisdiction shall be requested "when the commander believes the case has particular importance in maintaining proper standards of discipline." *Id.* at para. 15.

<sup>45</sup> *Gallagher v. United States*, 423 F.2d 1371, 1374, 191 Ct.Cl. 546 (1970), *cert. denied*, 400 U.S. 849 (1970) (judge took judicial notice that many servicemen are stationed in overseas areas, "some of which have a reputation for harsh laws and savagely operated penal institutions"); *Williams v. Froehlke*, 490 F.2d 998, 1004 (2d Cir. 1974) ("it was undoubtedly thought [by Congress] a boon to the accused to permit his trial in a court-martial rather than in a foreign court where a soldier might be subject to varying degrees of xenophobia").

<sup>46</sup> J. WOODLIFFE, *supra* note 33, at 182-183. *See also* S. LAZAREFF, *supra* note 6, at 194-195.

"particular importance."<sup>47</sup> This general waiver formula was further refined<sup>48</sup> in a multilateral agreement with Germany and NATO States having forces stationed in Germany<sup>49</sup> that automatically waives Germany's primary right to the pertinent sending State, but Germany may recall the waiver when "by reason of special circumstances in a specific case, major interests of German administration of justice make imperative the exercise of German jurisdiction."<sup>50</sup>

The above waiver mechanisms have been described as the conversion of otherwise rigid rules allocating jurisdiction into flexible guidelines allowing the parties to consider whose stake in prosecution should prevail.<sup>51</sup> The functioning of the NATO SOFA model of allocation of jurisdiction, despite the vagaries of a fluctuating political environment, has been described as standing the strain of overseas base practice remarkably well.<sup>52</sup> Indeed, these characterizations have been accurate. Whether they will remain so in an era of

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<sup>47</sup> Agreement with Annex between the United States of America and the Netherlands regarding Stationing of United States Armed Forces in the Netherlands, Aug. 13, 1954, 6 U.S.T. 103, 251 U.N.T.S. 91. The Agreement recognizes "the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned." *Id.* at 106.

<sup>48</sup> J. WOODLIFFE, *supra* note 33, at 183.

<sup>49</sup> Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with Respect to stationed in the Federal Republic of Germany, with Protocol of Signature, Aug. 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262 [hereinafter German Supplementary Agreement].

<sup>50</sup> The Germans have 21 days to exercise a recall after sending State notification of particular cases falling under the waiver provision. *Id.* at Art. 19, paras. 2 and 3.

<sup>51</sup> Lepper, *supra* note 14, at 177.

<sup>52</sup> J. WOODLIFFE, *supra* note 33, at 190. *See also* G. DRAPER, *supra* note 25, at 2.

emerging sovereignty, particularly in the area of environmental offenses highlighted by international sensitivity to environmental compliance and cleanup, is questionable.

#### D. Emerging Sovereignty and Potential Conflict with SOFA Obligations

##### 1. Postwar Historical Developments

The NATO SOFA and other SOFAs developing in the aftermath of World War II represented a logical and restrained approach to the problem of balancing sovereignty between sending and receiving States in an international system (unlike that from which customary international law developed) requiring a long-term presence of significant numbers of visiting forces in the territory of a receiving State.<sup>53</sup> Nevertheless, changing world events and emerging sovereignty of traditional postwar receiving States have changed the climate, if not yet the general practice, of adherence to SOFA treaty obligations. Despite continued cooperation and good relations among allies most of the time, the problem of the compatibility of permanently stationed "visiting" forces with the sovereignty, in its full sense, of a host nation remains.<sup>54</sup>

Reliance on SOFAs and supplementary agreements and practices thereunder should no longer be taken for granted.<sup>55</sup> Particularly for cutting edge issues such as environmental

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<sup>53</sup> Welton, *supra* note 20, at 114.

<sup>54</sup> Welton cites the example of France's withdrawal from the military structure of the NATO alliance in the 1960's as an illustration of sovereignty's contemporary political overtones. *Id.* at 88-89.

<sup>55</sup> While the basic SOFA framework remains constant, the particular rights and responsibilities within those agreements take on characteristics shaped by political changes occurring within the States that are parties to these agreements and by the greater international climate. These internal and non-security driven external factors gain more

compliance at overseas installations and disposition of environmental offenses under U.S. law, political changes must be taken into account. Attitudes toward U.S. forces overseas in peacetime have changed as a "complex web of essentially subjective, psychological factors revolving around issues of sovereignty, national dignity/humiliation" emerge.<sup>56</sup> The relevance of such factors is evident not only in familiar "trouble spots" such as Greece, Panama and Turkey, but also in countries with which the U.S. has traditionally enjoyed close defense ties such as Germany and South Korea.<sup>57</sup> Moreover, the end of the "Cold War," to include the reunification of Germany in 1990, the dissolution of the Warsaw Pact in 1991, and the emergence of new democracies in Eastern Europe, has provided a catalyst for receiving States in Europe, particularly Germany, to scrutinize their security arrangements and to review the diminution of sovereignty in the NATO SOFA and any bilateral agreements.<sup>58</sup>

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influence on evolving notions of sovereignty when the host nation perceives receding external security threats. See John E. Parkerson, Jr., *Book Review: The Peacetime Use of foreign Military Installations Under Modern International Law*, 141 MIL. L. REV. 232, 234-235 (1993).

<sup>56</sup> R. HARKAVY, *GREAT POWER COMPETITION FOR OVERSEAS BASES: THE GEOPOLITICS OF ACCESS DIPLOMACY* 9 (1982).

<sup>57</sup> J. WOODLIFFE, *supra* note 33, at 324-325. Protests concerning sending State force activities is often directed at the host nation military authorities who strive to work with U.S. forces under the SOFA but are sometimes lumped together as "militaries" that are "self-regulating, arrogant, speaking a different language, having a different culture, and making up their own rules." See, e.g., John M. Broder, *U.S. Military Leaves Toxic Trail Overseas*, L.A. TIMES, June 18, 1990, at A1 (quoting a member of the Green Party in the legislature of the German state of Rheinland-Pfalz).

<sup>58</sup> *Id.* at 325-326. Even before these events leading to the perception of a reduced threat and reduced need for U.S. forces stationed there, Germany in the 1980's became more aware of visiting NATO forces' environmental, economic and social impacts. See, e.g., Apel,

U.S. military authorities who may have become complacent in relying on the old ways of SOFA practice would be well advised to study the Revised German Supplementary Agreement<sup>59</sup>, negotiated as the result of the above changes and emerging German sovereignty.<sup>60</sup> NATO sending States were willing to make the concessions adopted in the Revised Supplementary Agreement in the interest of cooperative relations between allies and a continued presence in this strategically important region of the world.<sup>61</sup> Notable changes in the context of compliance with German law and environmental requirements include Article 53<sup>62</sup>, Article 54A, Article 54B, and Article 57.<sup>63</sup> The point of emerging sovereignty

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*The SPD Remains Firmly Committed to NATO*, 35 AUSSENPOLITIK 140, 144 (1984)("we have to ask ourselves whether our country is today...not already bearing an unduly heavy burden").

<sup>59</sup> The Agreement to Amend the Agreement of 3 August 1959, as Amended by the Agreements of 21 October 1971 and 18 May 1981, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany [hereinafter Revised Supplementary Agreement] was signed in Bonn, Germany, on March 18, 1993, by representatives of the German Government and the six NATO sending States including the U.S. These amendments will not become effective until ratified by each signatory according to its constitutional requirements. The substance of these amendments as they pertain to U.S. forces' environmental compliance in Germany is discussed in Section III.B.4., *infra*.

<sup>60</sup> Any doubt about Germany's full sovereignty was finally dispelled legally in the 1990 Treaty on the Final Settlement with respect to Germany, September 12, 1990, 29 I.L.M. 1186 (1990). Specifically, Article 7(2) provides, "The united Germany shall have accordingly full sovereignty over its internal and external affairs." *Id*.

<sup>61</sup> Parkerson, *supra* note 55, at 237.

<sup>62</sup> Article 53, para. 1, of the Revised Supplementary Agreement, *supra* note 59, provides that German law shall apply to the use of installations by sending State forces except as provided in the Revised Supplementary Agreement or other international agreements. In contrast, Article 53, para. 1, of the German Supplementary Agreement, *supra* note 49, provides that sending State forces may apply their own regulations in the fields of public safety and order where such regulations prescribe standards equal to or higher than

to be drawn from the Revised Supplementary Agreement for U.S. officials is that it would be a mistake to underestimate the public pressure on and political will of a receiving State to alter the traditionally relaxed SOFA practice regarding criminal jurisdiction enjoyed by the U.S.<sup>64</sup>

## 2. Conflicting Treaty Obligations

Finally, in the sovereignty context, one must be cognizant of the possibility of a receiving State not abiding by its SOFA commitment due to sovereignty in the form (or guise) of conflicting treaty obligations. Particularly contentious cases, striking sensitive political nerves in a host nation's and its public's sensitivity not anticipated by parties to the SOFA, may yield to undesirable results for the U.S. not preventable by simple reliance on past practices under a SOFA. Perhaps the most instructive examples of this occurrence are capital offenses committed by U.S. forces that are punishable by the death penalty under American military law -- now politically unacceptable in many countries.<sup>65</sup> In one recent

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those prescribed by German law. The new Article 53, when it applies, seems to render moot the old controversy of the relationship between Article 53 and Article II of the NATO SOFA requiring a sending State's force to "respect" the law of the receiving State. *Cf.* Welton, *supra* note 20, at 103-105. See Section III.B.3., *infra*.

<sup>63</sup> Discussed at Section III.B.4., *infra*.

<sup>64</sup> See, e.g., Welton, *supra* note 20, at 115 (In analyzing the disconnect between emerging German sovereignty and the NATO SOFA/German Supplementary Agreement, the author concludes, "[t]here is virtually no possibility that these agreements will be amended or abrogated in the foreseeable future, so they will most likely continue to regulate the activities of the sending states' forces.").

<sup>65</sup> John E. Parkerson, Jr. & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 MIL. L. REV. 41, 51 (1990).



case, despite the applicability of the *inter se* exception giving the U.S. the primary right of jurisdiction for a murder offense<sup>66</sup>, the Netherlands refused to turn over a U.S. military member potentially facing the death penalty to U.S. authorities, under the theory that to do so would violate the Netherlands' European Convention on Human Rights<sup>67</sup> treaty obligation.<sup>68</sup>

It is not too far fetched to imagine an analogous conflict between a host nation's NATO SOFA obligation to defer to the U.S. primary right of criminal jurisdiction for an environmental offense in an official duty case and the host nation's perceived treaty obligation (heightened by political pressure in the right case) to strictly enforce environmental criminal provisions under national or European Union (EU) law. The EU (formerly European Community (EC), first established as the European Economic Community by the Treaty of Rome<sup>69</sup>) has an aggressive agenda on environmental

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<sup>66</sup> See NATO SOFA, Article VII, para. 3(a)(I), *supra* note 30.

<sup>67</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221.

<sup>68</sup> *Short v. Kingdom of The Netherlands*, Nos. 13,949, 13,950, *excerpted and translated in* 29 I.L.M. 1388 (1990) (The Dutch High court ruled that The Netherlands' obligation under the Convention must prevail over the conflicting allocation of SOFA jurisdiction). A more detailed summary of the Short case is found in John E. Parkerson & Steven J. Lepper, *Short v. Kingdom of the Netherlands*, *International Decisions*, 85 A.J.I.L. 698 (1991). Short was later returned to U.S. authority after a delicate balancing of sovereignty by U.S. military authorities who conducted an investigation to refer the case to trial as non-capital, and the Dutch authorities then receiving previously requested assurance that the death penalty would not be imposed. See, e.g., J. WOODLIFFE, *supra* note 33, at 189.

<sup>69</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. The Maastricht Treaty builds upon this treaty with more sophisticated efforts toward economic and monetary unification. Treaty on European Union, 1992 O.J. (C 224/1).

compliance in the wake of the Single European Act's<sup>70</sup> incorporation of environmental law power into the Treaty of Rome. Authority exists under this structure for EU law to impose obligations independent of national law that member states, such as Germany with elaborate existing environmental protection regimes, must work to meet.<sup>71</sup> Such obligations have not yet reached the area of criminal enforcement (civil enforcement and liability is partially covered), but an analysis of the zealous EU environmental protection program reveals the reality of such a scenario.

A recent example of such a potential conflict was an EC Regulation<sup>72</sup> on the transboundary movement of hazardous waste and the U.S. position that the NATO SOFA qualified U.S. forces' shipments of hazardous waste for an exemption from the Basel Convention's<sup>73</sup> (and thus the EC Regulation's) requirements<sup>74</sup>. There was justifiably some

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<sup>70</sup> The Single European Act incorporated Title VII, the environmental title, into the Treaty of Rome with Articles 130r through 130t. O.J. L 169/1 (June 29, 1987) (adopted 1985, effective July 1, 1987).

<sup>71</sup> For an excellent discussion of EU environmental law, see Turner T. Smith & Roszell D. Hunter, *The European Community Environmental Legal System*, 22 ENVTL. L. REP. 10106 (Feb. 1992) [hereinafter Smith and Hunter]. This area is briefly discussed at Section IV *infra*.

<sup>72</sup> Council Regulation 259/93 on the Supervision and Control of Shipments of Waste within, into and out of the European Community, 1993 O.J. (L 30). This binding European Union regulation implements the provisions of the Basel Convention, *infra* note 73 regarding the transboundary shipment of hazardous waste.

<sup>73</sup> Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M. 649 (1989) [hereinafter Basel Convention].

<sup>74</sup> The U.S. apparently took the position that the NATO SOFA was equivalent to a multilateral agreement under Article 11 of the Basel Convention, thus exempting U.S. forces' shipments from the requirements of the EC Regulation, although Article 11 recognized such agreements only if not derogating from the sound management of hazardous

concern over whether such an approach subjected U.S. civilian employees (particularly in the Defense Logistics Agency) to criminal liability<sup>75</sup> for sending or receiving transboundary hazardous wastes without following the EU regulation's procedures. One may argue that such obligations are not really incompatible with the NATO SOFA.<sup>76</sup> In the end, however, in a system of sending State jurisdiction built entirely on the consent of the receiving State, the exercise of host nation sovereignty is often facilitated by a legal argument in which to cloak the actions of a nation either desiring or forced to take certain action.

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waste as required by the Basel Convention and no less environmentally sound than the Convention. See Letter from Colonel Joseph O. Pflanz, Jr., Commander, Defense Reutilization and Marketing Region-Europe (Jul. 11, 1994) (on file with that office).

<sup>75</sup> Article 4, paras. 4 and 5, of the Basel Convention provide that illegal traffic in hazardous waste is criminal, and Parties to the Convention shall take action to enforce the Convention including punishment of conduct contravening the Convention. Basel Convention, *supra* note 73.

<sup>76</sup> Cf. Parkerson & Lepper, *supra* note 68, at 701 (asserting that in the Short case the Dutch obligations under the Human Rights Convention and the NATO SOFA were not truly incompatible).

### III. Substantive Law Applicable to U.S. Forces Overseas

#### A. Extraterritorial Application of U.S. Law

##### 1. General Rules

At the turn of the century, American jurisprudence generally prohibited any extraterritorial application of U.S. law. The Supreme Court articulated this view in *American Banana Co. v. United Fruit Co.*<sup>77</sup> This rule has since evolved into a rebuttable presumption that American laws apply only territorially.<sup>78</sup> The most often cited case for this proposition of a presumption against extraterritorial application is *Foley Bros. v. Filardo*<sup>79</sup>, in which the Supreme Court emphasized "[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>80</sup> A more recent pronouncement of this high hurdle came from the Court in *Equal Employment Opportunity Com'n v. Arabian American Oil Co.*<sup>81</sup>, requiring "an affirmative intention of the Congress clearly expressed" to overcome the presumption.<sup>82</sup> The Court articulated two rationales for the strict rule: first, that Congress

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<sup>77</sup> 213 U.S. 347, 356 (1909) (rejecting extraterritoriality as "an interference with the authority of another sovereign, contrary to the comity of nations").

<sup>78</sup> *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (the question is whether a contrary intent appears in the statute to rebut the territorial only presumption).

<sup>79</sup> 336 U.S. 281 (1949).

<sup>80</sup> *Id.* at 285.

<sup>81</sup> 499 U.S. 244 (1991). Taken together, these cases comprise what has become known as the *Foley Bros./ARAMCO* presumption.

<sup>82</sup> *Id.* at 248. *See also* *Smith v. United States*, 113 S. Ct. 1178 (1993).

is assumed to legislate primarily with domestic concerns in mind; and second, that the presumption avoids encroachment on foreign sovereignty and the resulting creation of international discord.<sup>83</sup> With very few exceptions (such as "market statutes" in the fields of antitrust and securities law), courts are loath to disturb this ensconced canon of statutory construction.<sup>84</sup>

## 2. U.S. Environmental Legislation

The available commentary on the issue of extraterritorial application of U.S. environmental statutes unanimously concludes that these laws do not apply outside United States territory<sup>85</sup> (with the controversial possible exception of the National Environmental Policy Act<sup>86</sup>). A review of the major environmental statutes reveals that contrary to the requirement for a clear Congressional statement of extraterritorial application, these statutes are generally designed to cover pollution occurring within the territory of the United States. For example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) defines the "environment" as "any surface water, ground water, drinking water supply, land surface or subsurface strata or ambient air within the United States or under the

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<sup>83</sup> *Id.* at 248. See also Foley Bros. *supra* note 74, at 285-287.

<sup>84</sup> See Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

<sup>85</sup> See, e.g., *id.* at 608, 627-634; Richard A. Wegman & Harold G. Bailey, *The Challenge of Cleaning Up Military Wastes When U.S. Bases are Closed*, 21 ECOLOGY L. Q. 865, 924-925 (1994); Jennifer A. Purvis, *The Long Arm of the Law? Extraterritorial Application of U.S. Environmental Legislation in Outer Space*, GEO. INT'L ENVTL. L. REV. 455, 464-465 (1994).

<sup>86</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1994) [hereinafter NEPA].

jurisdiction of the United States," and requires the President to adopt a National Contingency Plan that addresses releases or threatened releases "throughout the United States."<sup>87</sup> The Clean Water Act's (CWA) objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and defines covered navigable waters as "waters of the United States."<sup>88</sup> The Clean Air Act's (CAA) purpose is "to protect and enhance the quality of the Nation's air resources," and sets up an elaborate scheme using air quality control regions in the United States.<sup>89</sup>

The Resource Conservation and Recovery Act's<sup>90</sup> (RCRA) extraterritorial application to the United Kingdom was litigated and resolved in *Amlon Metals Inc. v. FMC Corp.*<sup>91</sup> In reviewing the statutory language similar to the above statutes<sup>92</sup> and legislative history, the Court concluded that the plaintiff had not met the threshold showing required by *Foley*

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<sup>87</sup> Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601(8) and 9605(a)(8)(A) (1994) [hereinafter CERCLA].

<sup>88</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251(a) and 1362(7) (1994) [hereinafter CWA].

<sup>89</sup> Clean Air Act, 42 U.S.C. §§ 7401(b) and 7407 (1994) [hereinafter CAA].

<sup>90</sup> Resource Conservation and Recovery Act, §§ 6901 to 6992k (1994) [hereinafter RCRA].

<sup>91</sup> 775 F. Supp. 668 (S.D.N.Y. 1991). The plaintiff had arranged for waste residues generated by defendant to be shipped to the United Kingdom for recovery, but upon discovery that the waste contained hazardous waste, attempted to bring an action under RCRA's citizen suit provisions alleging "imminent and substantial endangerment" to workers in the United Kingdom.

<sup>92</sup> RCRA was passed to address the problem of waste disposal as "a matter national in scope"; and Congress found that "alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid disposal sites" *Id.* at 675-676.

*Bros./ARAMCO* to overcome the presumption against extraterritoriality.<sup>93</sup> The issue of another environmental statute's extraterritorial application was litigated in *Defenders of Wildlife, Friends of Animals v. Lujan*,<sup>94</sup> but the Supreme Court reversed the lower courts' finding of extraterritoriality on standing grounds.<sup>95</sup>

There remains an interesting controversy as to the extraterritorial application of NEPA (rooted in the sweeping language of the statute; e.g., "harmony between man and his environment", "eliminate damage to the environment and biosphere", "restoring and maintaining environmental quality to the overall welfare and development of man", and "recogniz[ing] the worldwide and long-range character of environmental problems"<sup>96</sup>). Unlike other U.S. environmental statutes (most with associated criminal provisions for violations thereof), NEPA contains no substantive requirements and is essentially

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<sup>93</sup> *Id.* The Court further noted that the defendant's policy arguments that extraterritorial application of RCRA could create awkward foreign relations difficulties, though not determinative, were persuasive. *Id.* at 676, n.11.

<sup>94</sup> 911 F.2d 117 (8th Cir. 1990). The Eighth Circuit upheld a District Court's decision that found Congress had intended the Endangered Species Act requirements for interagency consultation applied to federal activities without regard to the location of the activities. The Endangered Species Act of 1973, 16 U.S.C. § 1536 (1994) [hereinafter ESA].

<sup>95</sup> *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). In a concurring opinion, Justice Stevens disagreed with the majority's determination on standing, but concurred in the result since he believed that Congress did not express a clear enough desire for the ESA to apply outside the U.S. *Id.* at 2147. See also David A. Mayfield, *The Endangered Species Act and its Applicability to Deployment of U.S. Forces Overseas* (Dec. 1994) (on file at The Judge Advocate General's School, United States Army, Charlottesville, Virginia).

<sup>96</sup> NEPA *supra* note 86, §§ 4321, 4331(A), and 4332(2)(F).

procedural,<sup>97</sup> only requiring federal agencies to do an environmental impact statement (EIS) for any major federal project or action.<sup>98</sup> The issue of whether an EIS was required for a major federal action abroad was addressed in Executive Order 12,114<sup>99</sup>, specifically exempting federal agencies from the E.O. 12,114's requirement for an EIS-type procedure for major federal actions significantly affecting the environment of a foreign nation, unless that foreign nation is not participating with the U.S. or not otherwise involved with the action.<sup>100</sup> However, *EDF v. Massey*,<sup>101</sup> rekindled this controversy. There, the D.C. Circuit Court held that NEPA's EIS requirement did apply to National Science Foundation activities in Antarctica, a place the Court characterized as a sovereignless continent without foreign policy problems if NEPA applied<sup>102</sup>. In any event, the controversy appears to have subsided in the context of U.S. forces overseas by *NEPA Coalition of Japan v. Aspin*,<sup>103</sup> with the D.C. District Court holding NEPA inapplicable to U.S. Navy activities in Japan where the Court found Japan was involved in the proposed action.<sup>104</sup>

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<sup>97</sup> *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

<sup>98</sup> NEPA *supra* note 86, § 4332(2)(C)

<sup>99</sup> Exec. Order No. 12,114, 44 Fed. Reg. 1957, (1979) [hereinafter E.O. 12,114].

<sup>100</sup> *Id.* at para. 2-3(b).

<sup>101</sup> 986 F.2d 528 (D.C. Cir. 1993).

<sup>102</sup> *Id.* at 534-535.

<sup>103</sup> 837 F. Supp. 466 (D.D.C. 1993).

<sup>104</sup> *Id.* at 467-468. Of particular relevance to the subject of this article is the Court's reliance on the Japan SOFA, *supra* note 24, governing the activities of U.S. forces and the concomitant foreign policy and sovereignty concerns in attempting to apply U.S. law



### 3. The Uniform Code of Military Justice (UCMJ)<sup>105</sup>

Under standard SOFA provisions outlining concurrent criminal jurisdiction, sending states have the right to exercise criminal jurisdiction over those persons subject to the military law of the sending state.<sup>106</sup> The UCMJ is a classic application of such military law. Article 5<sup>107</sup> specifies that "[t]his chapter applies in all places," as Congress clearly intended to make the UCMJ extraterritorial.<sup>108</sup> Convening a court-martial in a foreign country clearly constitutes an exercise of extraterritorial jurisdiction by the U.S.<sup>109</sup> At one time as to U.S. military forces, whether an offense was "service-connected" was a constitutional impediment to subject matter jurisdiction<sup>110</sup> of a court-martial in many offenses committed off an installation and triable by civilian authorities.<sup>111</sup> This restriction on jurisdiction over military

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extraterritorially under these circumstances.

<sup>105</sup> Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (1994) [hereinafter UCMJ].

<sup>106</sup> See, e.g., NATO SOFA, Article VII, para. 1(a), *supra* note 27.

<sup>107</sup> UCMJ, *supra* note 105, § 805.

<sup>108</sup> *United States v. Keaton*, 41 C.M.R. 64, 66 (C.M.A. 1969) *citing* *United States v. Bowman*, 260 U.S. 94 (1922) (the U.S. Constitution does not prevent the exercise of extraterritorial criminal jurisdiction). The constitutional authority for Congress's extraterritorial application of the UCMJ is U.S. CONST. art. I, §8, cl. 14, granting Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." See *United States v. Schafer*, 32 C.M.R. 83 (C.M.A. 1962).

<sup>109</sup> *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982)

<sup>110</sup> Manual for Courts-Martial, 1984, Exec. Order No. 12,473, 49 Fed. Reg. 17152 (1984), Rules for Courts-Martial (RCM) 203 [hereinafter MCM].

<sup>111</sup> *O'Callahan v. Parker*, 395 U.S. 258 (1969).

members has since been replaced by a "status test," wherein subject matter jurisdiction of an offense committed anywhere depends solely on an accused's status as a member of the U.S. armed forces.<sup>112</sup> Successfully prosecuting military members of U.S. forces overseas for environmental offenses still depends on utilizing a substantive punitive article of the UCMJ.<sup>113</sup>

Therefore under military law, the locus of the crime and its connection to the armed services and its mission makes no difference as to UCMJ jurisdiction. What does make a difference, however, as most recently recognized by the Supreme court in *Solorio*, is the status of an offender and his amenability to jurisdiction as a person subject to the UCMJ.<sup>114</sup>

It probably comes as no surprise to today's civilian that civilians are not normally subject to the UCMJ. During the first decade following World War II, however, UCMJ provisions allowing UCMJ jurisdiction over certain civilians (e.g., civilians accompanying a force into foreign nations)<sup>115</sup> were regularly used to prosecute civilians accompanying U.S. forces

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<sup>112</sup> United States v. Solorio, 483 U.S. 435 (1987).

<sup>113</sup> UCMJ, *supra* note 105, and MCM, *supra* note 110 at Part IV, Punitive Articles. How to use the UCMJ for environmental prosecutions is discussed at Section V, *infra*.

<sup>114</sup> UCMJ, *supra* note 105, Article 2, and MCM, *supra* note 1, RCM 202(a). See also United States v. Loving, 34 M.J. 956, 967 (C.M.A. 1992) (The test for jurisdiction is one of status under UCMJ Article 2, not location, given the clear extraterritorial application of the UCMJ as reinforced by United States v. Solorio).

<sup>115</sup> UCMJ, *supra* note 105, Article 2(11) provides for jurisdiction, subject to any treaty or accepted rule of international law, over persons serving with, employed by, or accompanying the armed forces outside the United States or its territories. Beyond the scope of this article is UCMJ jurisdiction over civilians in time of war. UCMJ, *supra* note 105, § 802(10).

abroad who committed criminal offenses.<sup>116</sup> Thus, when the NATO SOFA was negotiated, the U.S. was in a jurisdictional position similar to other European civil law countries that could exercise criminal jurisdiction over their nationals wherever they might be<sup>117</sup>, although the U.S. derived this authority as to its civilians accompanying a force solely from the UCMJ.<sup>118</sup>

A series of Supreme Court cases sounded the death knell for the U.S. exercise of criminal jurisdiction under the UCMJ over civilians accompanying U.S. forces overseas. Beginning with *Reid v. Covert* and *Kinsella v. Krueger*,<sup>119</sup> the Court held that UCMJ, Article 2(11)<sup>120</sup> could not be constitutionally applied to civilian dependents in capital cases. Scrambling to recover its basis for jurisdiction, the U.S. took the narrow view that since *Reid* expressed no opinion on the constitutionality of court-martial trials for noncapital offenses committed by civilian employees accompanying U.S. forces, it would continue to exercise this jurisdiction.<sup>121</sup> In the cases of *McElroy v. United States ex rel. Guagliardo* and *Wilson v. Bohlender*,<sup>122</sup> the Court extended the unconstitutional finding in *Reid* to any courts-martial

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<sup>116</sup> See G. DRAPER, *supra* note 25, at 51-52. See also AFP 110-3, *supra* note 44, at para 19-13(a).

<sup>117</sup> See Georges R. DeLaume, *Jurisdiction Over Crimes Committed Abroad: French and American Law*, 21 GEO. WASH. L. REV. 179 (1952).

<sup>118</sup> UCMJ, *supra* notes 105 and 115.

<sup>119</sup> 354 U.S. 1 (1957).

<sup>120</sup> UCMJ, *supra* notes 105 and 115.

<sup>121</sup> G. DRAPER, *supra* note 25 at 133.

<sup>122</sup> 361 U.S. 281 (1960).

of civilian employees (in peacetime). Although the extent of U.S. "jurisdiction" (as that term may be loosely defined administratively<sup>123</sup>) may still exist in practice, the outcome of these cases inevitably becomes that the receiving states of U.S. forces enjoy exclusive criminal jurisdiction over any class of civilian accompanying U.S. forces under a SOFA treaty arrangement.<sup>124</sup> Member nations to bilateral and multilateral SOFAs with the U.S. conceptually understand this limitation on U.S. criminal jurisdiction over civilians accompanying its forces overseas.<sup>125</sup> Nonetheless, the U.S. policy of maximizing the return of cases continues unabated, even when fair trial issues are not present.<sup>126</sup>

#### 4. General U.S. Criminal Law

Lacking UCMJ criminal jurisdiction over U.S. civilian employees, a remote possibility exists for extraterritorial application of certain federal crimes in Title 18 of the U.S. Code. Generally, U.S. criminal jurisdiction is based on territorial principles, and

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<sup>123</sup> See Section VI., *infra*.

<sup>124</sup> Such a conclusion flows from the language of most SOFAs that sending State jurisdiction emanates from its jurisdiction over persons under military law. See, e.g., NATO SOFA, Article VII, para 2(a), *supra* note 29. Interestingly, this result and the predicament of U.S. force authorities to continue to try to maximize jurisdiction in the absence of concurrent jurisdiction runs contrary to the Senate's ratification of the NATO SOFA. It is also clear that the Senate, in consenting to ratification, considered that very few case would be subject to exclusive foreign jurisdiction, and assurances were given that most violations would be punishable under the UCMJ. See Foreign Relations Committee Hearings, *supra* note 18, cited in J. SNEE & K. PYE, *supra* note 32, at 33.

<sup>125</sup> See, e.g., Agreed Minutes to Korean SOFA, *supra* note 24, Article XXII, para. 1(a).

<sup>126</sup> The scope of the problem with respect to environmental offenses committed by civilian employees of U.S. forces overseas should be obvious. This problem is further examined in Section VI, *infra*.

criminal statutes are not given an extraterritorial effect.<sup>127</sup> Currently, the U.S. only has extraterritorial jurisdiction within its special maritime and territorial jurisdiction and even then only for certain individual offenses clearly extraterritorial in the U.S. Code, such as treason.<sup>128</sup> The special maritime and territorial jurisdiction covers U.S. embassy compounds, U.S. ships on the high seas, and other limited locations, but not overseas military bases.<sup>129</sup> Most offenses committed by civilians accompanying our forces do not fall within this jurisdiction.<sup>130</sup>

One provision with potential application to U.S. civilian employees committing environmental offenses overseas is 18 U.S.C. § 1001.<sup>131</sup> In *United States v. Walczak*,<sup>132</sup> this

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<sup>127</sup> *United States v. Flores*, 289 U.S. 137, 155-157 (1933).

<sup>128</sup> General Accounting Office, *Some Criminal Offenses Committed Overseas by DOD Civilians Are Not Being Prosecuted: Legislation is Needed* 5, (1979) [hereinafter GAO Report on Civilians].

<sup>129</sup> 18 U.S.C. § 7 (1994). See also Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas -- Still With Us*, 117 MIL. L. REV. 153, 174 (1987).

<sup>130</sup> *Id.* There has been some judicial activism in applying some federal crimes overseas when Congress is silent on their extraterritorial application. For example, in *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989), the Court held that 18 U.S.C. § 351, prohibiting the killing of a member of Congress, applied extraterritorially to conduct in Guyana, relying on a test of whether the crime is not logically dependent on its locality but, instead, injures the government wherever the crime occurs. It is beyond the scope of this article to review all crimes in Title 18 with potential extraterritorial application; moreover, a review of 18 U.S.C. readily reveals that very few provisions could apply to environmental crimes already covered by the environmental statutes discussed in Section III.A.2., *supra*.

<sup>131</sup> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers-up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same could

provision was held to apply to a false statement made on a U.S. Customs form outside the United States, since the customs procedure and form were within the jurisdiction of the Department of the Treasury. Depending on the substantive duties of U.S. civilian employees to make records regarding environmental matters<sup>133</sup> (a prime example being the disposal of hazardous waste), such a statute could conceivably apply.<sup>134</sup>

## B. Environmental Compliance Obligations for U.S. Forces Overseas

### 1. Presidential and Congressional Mandates

As early as the Carter Administration, there was general concern about the environmental consequences of federal agency actions overseas. President Carter issued an Executive Order that imposed a limited form of NEPA compliance on agency actions abroad.<sup>135</sup> E.O. 12,114 has been construed as not applying to most U.S. forces' actions overseas, based on its language requiring an EIS-type environmental review only if foreign

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contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1001 (1994).

<sup>132</sup> 783 F.2d 852 (9th Cir. 1986).

<sup>133</sup> Substantive environmental obligations on U.S. forces overseas now exist in the form of country-specific final governing standards. See Section III.B.2., *infra*.

<sup>134</sup> Should this provision apply, Congress has legislated venue to adjudicate extraterritorial offenses in the federal district court in the district where the offender is apprehended or first brought. 18 U.S.C. 3238 (1994). The application of any provision of U.S. federal criminal law besides the UCMJ does not, however, address issues of arrest, extradition or conformity with SOFA procedures. See Section VI.B. *infra*.

<sup>135</sup> E.O. 12,114, *supra* note 99.

nations are not participating with the U.S. or otherwise not involved in the action.<sup>136</sup> Previously in 1978, President Carter had issued another Executive Order, *Federal Compliance with Pollution Control Standards*.<sup>137</sup> E.O. 12,088 requires each executive agency to comply with the "applicable pollution control standards" of U.S. environmental statutes, meaning the same substantive and procedural requirements that would apply to a private person.<sup>138</sup> E.O. 12,088 did address overseas facilities to the extent it required each agency responsible for the construction or operation of federal facilities outside the U.S. to ensure that such construction or operation complied with the environmental pollution control standards of general applicability in the host country.<sup>139</sup> At that time, the Department of Defense (DOD) had also been operating under a directive requiring U.S. forces overseas to conform at all times to the environmental quality standards of the host country, international agreements, and Status of Forces Agreements."<sup>140</sup>

In the 1980's, environmental groups began to take their concerns about DOD's

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<sup>136</sup> E.O. 12,114, *supra* notes 99 and 100. Even U.S. military officials have noted the overbreadth of E.O. 12,114 with respect to precluding the development of an EIS process when it would otherwise make sense. Specifically, "participation" by another nation is undefined, and therefore almost any official involvement by host nation officials could block preparation of an EIS. See General Accounting Office, *Improved Procedures Needed for Environmental Assessments of U.S. Actions Abroad* 10 (1994).

<sup>137</sup> Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (1978) [hereinafter E.O. 12,088].

<sup>138</sup> *Id.* at §§ 1-102, 1-103.

<sup>139</sup> E.O. 12,088, *supra* note 137, at § 1-801.

<sup>140</sup> DOD Directive 5100.50, *Protection and Enhancement of Environmental Quality* (1973) (on file with the Air Force Legal Services Agency, Environmental Law and Litigation Division, Rosslyn, Virginia).

overseas environmental compliance to Congress, and Congress began to focus on which standards to apply at overseas bases during the Bush Administration.<sup>141</sup> A House Armed Services Committee investigation in 1991 found that U.S. bases overseas followed practices inconsistent with U.S. and host nation environmental standards.<sup>142</sup> About the same time, a General Accounting Office Report warned that hazardous waste disposal practices at overseas military installations could jeopardize international relationships because U.S. forces overseas had received little guidance as to what environmental law or policies they should follow.<sup>143</sup>

In the wake of these findings, Congress directed the Secretary of Defense to "develop a policy for determining applicable environmental requirements for military installations located outside the United States," and "[i]n developing the policy, the Secretary shall ensure that the policy gives consideration to adequately protecting the health and safety of military and civilian personnel assigned to such installations."<sup>144</sup> In response to this Congressional

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<sup>141</sup> Wegman & Bailey, *supra* note 85, at 935.

<sup>142</sup> *House Armed Services Hearings*, 101st Cong., 1st Sess. 10 (1991) (statement of Rep. Ray).

<sup>143</sup> General Accounting Office, *Hazardous Waste: Management Problems Continue at Overseas Military Bases* 45 (1991) [hereinafter GAO Report on Overseas Bases]. This GAO Report examined ten bases in Germany, Italy, the United Kingdom, Japan, Korea, and the Philippines and found that the operations at these bases had violated both U.S. and host nation environmental laws. *Id.* at 28, 46-47.

<sup>144</sup> National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 342(b)(1), 104 Stat. 1485, 1537 (1990) [hereinafter FY91 NDAA]. There has been considerable commentary about Congress and DOD being more concerned about environmental compliance at overseas bases than with cleanup of bases (particularly those to be closed). The FY91 NDAA § 342(b)(2) required DOD to come up with a cleanup policy, and the House version of the National Defense Authorization Act for Fiscal Year



mandate, DOD issued another directive to create a process of establishing and implementing specific environmental standards at overseas installations.<sup>145</sup> DOD Directive 6050.16 generally implements the following procedures for Environmental Executive Agents (EAs):<sup>146</sup> identify host nation environmental standards (including those specifically delegated to regional or local governments for implementation) and the enforcement record of such laws and standards to determine their applicability to DOD installations; identify and review applicable environmental standards from base rights agreements and Status of Forces

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1993, Pub. L. No. 102-484, § 1301(e)(2)(A), 106 Stat. 2315, 2545 (1992) called for the cost of environmental restoration at overseas military bases to be borne by the host nation. The Senate receded with an amendment for an "equitable division" of the restoration costs with the host country. H.R. CONF. REP. NO. 966, 102d Cong., 2d Sess. 683, *reprinted in* 1992 U.S.C.C.A.N. 1770, 1774. The DOD policy on compliance is well underway (discussed in Section III.B.2. *infra*), but to date, no such restoration policy has been approved. A high level working group in the Pentagon is currently attempting to finalize a draft "Environmental Remediation Policy for DOD Activities Overseas." Interview with Lieutenant Colonel David Rathgeber, Director, Environmental Law Branch, Air Force Environmental Law and Litigation Division, in Rosslyn, Virginia (Jul. 3, 1995) [hereinafter Rathgeber Interview].

<sup>145</sup> DOD Directive 6050.16, *DOD Policy for Establishing and Implementing Environmental Standards at Overseas Military Installations* (1991) (on file with the Office of the Deputy Assistant Secretary of Defense (Environment)) [hereinafter DOD Dir. 6050.16]. The directive codified DOD's representation to Congress that it was prepared to apply tough environmental standards to overseas facilities with ongoing operations. See *DOD Envtl. Programs: Hearings Before the Readiness Subcomm., the Envtl. Restoration Panel, and the Dep't of Energy Defense Nuclear Facilities Panel of the House Comm. on Armed Servs.*, 102d Cong., 1st Sess. 142 (1991) (testimony of Thomas E. Baca, Deputy Assistant Secretary of Defense (Environment)).

<sup>146</sup> Environmental Executive Agents (EAs) have been appointed by the Secretary of Defense for each foreign country where the U.S. maintains a substantial presence of forces. Such EAs are normally a military department for countries in Europe (e.g., the U.S. Army for Germany, the U.S. Navy for Italy, and the U.S. Air Force for the United Kingdom); in Asia, the EAs are usually subordinate unified commands (e.g., U.S. Forces Japan for Japan and U.S. Forces Korea for South Korea).

Agreements; compare host nation law applicable to U.S. forces with baseline guidance to be developed from U.S. environmental law requirements; and draft and publish mandatory standards for environmental compliance incorporating the stricter of either host nation environmental law or the baseline guidance.<sup>147</sup> DOD Directive 6050.16 has led to the creation of baseline and country-specific environmental compliance standards.

## 2. Overseas Environmental Baseline Guidance Document and Final Governing Standards

In 1992, DOD adopted the Overseas Environmental Baseline Guidance Document<sup>148</sup> to begin implementing the mandates of the FY91 NDAA and DOD Directive 6050.16. The OEBGD contains specific environmental compliance criteria based on U.S. environmental laws<sup>149</sup> to be used by EAs in developing "final governing standards"<sup>150</sup> to be used by all DOD installations in a particular host nation.<sup>151</sup> Furthermore, the OEBGD provides that, unless inconsistent with applicable host nation law, base rights, and SOFAs or other international agreements, the baseline environmental guidance shall be applied by U.S. forces overseas when host nation environmental standards do not exist or provide less protection to human

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<sup>147</sup> DOD Dir. 6050.16, *supra* note 145, at paras. C.1. and C.2.

<sup>148</sup> DEPARTMENT OF DEFENSE ENVTL. OVERSEAS TASK FORCE, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (1992) [hereinafter OEBGD].

<sup>149</sup> Consideration included statutory provisions and regulations for RCRA, *supra* note 90; CWA, *supra* note 88; CAA, *supra* note 89; and ESA, *supra* note 94. OEBGD, *supra* note 148, at 1-4.

<sup>150</sup> "Country-specific substantive provisions, typically technical limitations on effluent, discharges, etc., or a specific management practice, with which installations must comply." OEBGD, *supra* note 148, at 1-2.

<sup>151</sup> *Id.* at I.

health and the natural environment than the baseline guidance.<sup>152</sup> The OEBGD and final governing standards contain standards for air emissions; drinking water; wastewater; hazardous materials; solid and hazardous waste; medical waste management; petroleum, oil and lubricants; noise; pesticides; historic and cultural resources; endangered species and natural resources; polychlorinated biphenyls; asbestos; radon; environmental impact assessments; spill prevention and response planning; and underground storage tanks.<sup>153</sup> The OEBGD and final governing standards apply to DOD installations overseas, but not to ships, aircraft, and operational and training deployments off the installation.<sup>154</sup>

In enforcing binding<sup>155</sup> final governing standards, the OEBGD strategy is to use the individual service structures to enforce the compliance standards developed in the final governing standards.<sup>156</sup> Temporary waivers of or deviation from compliance with any final governing standards are available if compliance at a particular installation or facility would

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at Chapters 2-19.

<sup>154</sup> *Id.* at 1-1.

<sup>155</sup> "Military Departments and Defense Agencies will ensure compliance with the final governing standards established by the Executive Agent...[and] DOD Installation commanders will comply with the final governing standards." *Id.* at 1-6. This directive has been further implemented by unified command regulation mandating compliance. *See, e.g.,* EUCOM Directive 80-1, *Environmental Matters*, paras. 7b and 8b (1994) (on file with the U.S. European Command, Office of the Legal Advisor, Stuttgart, Germany). The final governing standards should not employ discretionary judgments but technically achievable concrete requirements. EUCOM Environmental Executive Agent Steering Committee Report, *OEBGD Questions and Answers* (undated) (on file with the U.S. European Command, Office of the Legal Advisor, Stuttgart, Germany) [hereinafter EUCOM Report].

<sup>156</sup> OEBGD, *supra* note 148, at 1-3, 1-5.

seriously impair its operations, adversely affect relations with the host nation, or require substantial expenditure of funds not available for such purpose.<sup>157</sup>

The OEBGD originally envisioned final governing standards by late 1993 unless responsible commanders (e.g., the commander of U.S. European Command for countries in Europe) approved a waiver.<sup>158</sup> As of the date of this article, not all final governing standards have yet been approved.<sup>159</sup> When final governing standards are complete and approved, representing the more protective of either the OEBGD or the enforced host nation standards,<sup>160</sup> DOD views them as the "sole compliance standards at installations and

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<sup>157</sup> *Id* at 1-8 to 1-9. EAs are to approve such waivers (unless the military department requesting the waiver is also the EA when the waiver must be referred to the next higher command echelon), and this waiver process may not grant treaty obligation waivers. *Id*.

<sup>158</sup> *Id.* at 1-5 to 1-6.

<sup>159</sup> Final governing standards in final draft exist for Korea and Germany but have not yet been approved. The German Final Governing Standards [hereinafter Germany FGS] have been deliberately not approved by the EA (U.S. Army) because an issue of how to fund and pay for the compliance mandated by the German FGS exists, particularly at Army installations. Although other final governing standards, such as those for Italy [hereinafter Italy FGS], have been approved by the EA (U.S. Navy for Italy), the Navy Comptroller has taken the position that FGS requirements are not "legal requirements" for purposes of funding environmental compliance. Telephone interviews with Commander Michael McGregor, U.S. European Command Office of the Legal Advisor, Stuttgart, Germany (Jul. 5, 1995), and Lieutenant Colonel Richard Phelps, U.S. Air Forces in Europe Office of the Staff Judge Advocate, Ramstein Air Base, Germany (Jul. 6, 1995) [hereinafter Phelps Interview].

<sup>160</sup> OEBGD policy requires final governing standards to include substantive criteria without referring to the source of the U.S. or enforced host nation standard. The challenge in drafting many final governing standards was to determine the host government's enforcement record on a myriad of host nation environmental laws. Telephone Interview with Lieutenant Colonel Dean Rodgers, Staff Judge Advocate, Air Force Center for Environmental Excellence, Brooks Air Force Base, Texas (Jul. 6, 1995) [hereinafter Rodgers Interview]. For example, The U.S. position was that if the host nation did not enforce standards on its own installations or exempted its military by law from those standards, then

facilities in foreign countries."<sup>161</sup> EAs are required to revalidate the final governing standards annually to reflect significant changes in host nation requirements or the OEBGD<sup>162</sup>

### 3. SOFA Obligations

As a matter of customary international law, activities of a foreign nation within the territory of a host nation are governed by host nation law unless there is an agreement otherwise between the nations as to the applicable standards.<sup>163</sup> SOFAs have constituted such an agreement whereby the U.S. has agreed only to "respect," but not generally be bound by, host nation law with respect to U.S. forces' activities overseas.<sup>164</sup> Most SOFAs and

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such standards were not enforceable against U.S. forces. EUCOM Report, *supra* note 156. See also Jody Meier Reitzes, *The Inconsistent Implementation of the Environmental Laws of the European Community*, 22 ENVTL. L. REP. 10523, 10524-10525 (1992) (Enforcement among EU Member nations varies considerably).

<sup>161</sup> See, e.g., Air Force Instruction 32-7006, *Environmental Program in Foreign Countries*, para. 3.3. (CD-Rom Version, March 1995) (on file at the Air Force Environmental Law and Litigation Division, Rosslyn, Virginia) [hereinafter AFI 32-7006]. For an example of such final governing standards on hazardous waste in Italy, see Italy FGS, Chapter 6, *infra* Appendix A (specifying hazardous waste standards).

<sup>162</sup> OEBGD, *supra* note 149, at 1-5. The OEBGD will likely not be updated until one year after the last final governing standards are approved (Germany or Korea), and when published, will likely require changes to every country's final governing standards. See Richard A. Phelps, *Environmental Law at USAFE Installations* 3 (1994) (distributed to the Command Staff Judge Advocate Conference and on file with the U.S. Air Forces in Europe Office of the Staff Judge Advocate).

<sup>163</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401-403, 115 cmt. d (1986).

<sup>164</sup> Article II of the NATO SOFA, *supra* note 19, provides: "[I]t is the duty of a force and its civilian component...to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement...". See also Japan SOFA, *supra* note 24, Article XVI, and Korea SOFA, *supra* note 24, Article VII. The word "respect" is vague and problematic in that it implies less than full immunity from host nation law but is not equivalent to obey, and compliance in specific contexts with host nation law

bilateral supplementary agreements were drafted in an age when environmental issues were hardly considered (if at all) and thus reflect an absence of any specific provisions concerning compliance with host nation environmental law.<sup>165</sup>

Theoretically, the issue as to environmental compliance should be resolved with approved final governing standards applying host nation environmental laws that are stricter than U.S. environmental laws to U.S. forces. Practical problems associated with this theory, however, include the difficulty associated with keeping up with new and rapidly changing host nation environmental laws and regulations,<sup>166</sup> the lack of references to host nation laws and standards in final governing standards,<sup>167</sup> delays in incorporating new host nation laws into the final governing standards,<sup>168</sup> and the perception by host nations that final governing

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on a particular subject has often been the subject of controversy and debate. See Welton, *supra* note 20, at 95-96, 107.

<sup>165</sup> AIR FORCE JUDGE ADVOCATE GENERAL'S SCHOOL INTERNATIONAL AND OPERATIONS LAW DESKBOOK VI-6 (1995) (on file with the Office of The Judge Advocate General, Air Force International and Operations Law Division, Washington D.C.) [hereinafter JAG International Law Deskbook].

<sup>166</sup> In Germany, for example, the existing volume and diversity of regulations, coupled with the fragmentation of German environmental laws in general, provide major obstacles to German implementation and enforcement, leading to the creation of a commission by the German Federal Minister of the Environment to consolidate and restate German environmental law. See Hans D. Jarass & Joseph DiMento, *Through Comparative Lawyers' Goggles: A Primer on German Environmental Law*, 6 GEO. INT'L ENVTL. L. REV. 47,69-70 (1994).

<sup>167</sup> See *supra* note 160.

<sup>168</sup> See *supra* note 162. Although the OEBGD requires an annual update to final governing standards, past practice in a related area casts doubt on DOD's ability or willingness to do so. The SOFA Tri-Service Regulation, *supra* note 40, at para 1-6, requires the designated commanding officer (e.g., the Commander of U.S. Army Europe for Germany, similar to the EA setup) for each country in which U.S. forces are stationed to

standards' compliance not necessarily equaling host nation compliance.<sup>169</sup> Nonetheless, final governing standards give U.S. forces overseas clear and tangible environmental compliance standards against which they may be judged, as well as providing substantive standards to facilitate U.S. efforts in maximizing its jurisdiction over offenses committed by its forces.

#### 4. The Revised German Supplementary Agreement

A renegotiated Revised German Supplementary Agreement<sup>170</sup>, the first of its kind but not yet ratified by all signatory States, directly applies German law to U.S. forces' activities in Germany.<sup>171</sup> In addition, specific environmental provisions of the Revised Supplementary

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make a study of the host nation criminal laws and procedures in effect and to "[e]nsure that such studies are kept current." In researching host nation environmental criminal law applicable to U.S. forces, the author discovered that the most current country criminal law studies dated from the 1970's to early 1980's, before the passage of environmental criminal provisions now applicable in those foreign countries. Hopefully, the updating of final governing standards will receive a higher priority.

<sup>169</sup> Host nation administrative procedures for environmental compliance are not required to be adopted in final governing standards setting substantive compliance. *See* EUCOM Report, *supra* note 155. Thus, a host nation "notice of violation" or "report of findings" from host nation regulatory authorities is considered not generally enforceable. *See, e.g.,* AFI 32-7006 *supra* note 161, at para. 6.3.5.

<sup>170</sup> Revised Supplementary Agreement, *supra* note 59.

<sup>171</sup> Article 53 of the Revised Supplementary Agreement adds the following: "German law shall apply to the use of such accommodation [i.e., installations of exclusive U.S. use] except as provided in the present Agreement and other international agreements...and other internal matters which have no foreseeable effect on the rights of third parties or on adjoining communities or the general public." *Id.* Some U.S. officials see little impact of this provision on current compliance since current environmental obligations prescribed by German law apply under the current German Supplementary Agreement, *supra* note 49, Article 53, either as more protective public safety standards or as encompassed in more protective U.S. public safety standards. *See, e.g.,* Richard A. Phelps, *Impact of the 1993 Supplementary Agreement to the NATO SOFA on Environmental Requirements Applicable to USAFE Installations in the Federal Republic of Germany* (1994), reprinted in JAG International Law Deskbook, *supra* note 165, at VI-31 [hereinafter Phelps,

Agreement: (a) require the use of fuels, lubricants and additives that are low pollutant in accordance with German environmental regulations for U.S. aircraft and motor vehicles, if such use is compatible with the technical requirements of these aircraft and vehicles;<sup>172</sup> (b) apply German regulations for the limitation of noise and exhaust gas emissions from passenger and utility vehicles to the extent not excessively burdensome;<sup>173</sup> (c) require the U.S. to observe German regulations on the transport of hazardous materials;<sup>174</sup> and (d) require the U.S. to bear the running costs of necessary measures within the installation to prevent physical environmental damage.<sup>175</sup>

Whether the Revised Supplementary Agreement goes beyond the requirements of the final governing standards for Germany remains to be seen.<sup>176</sup> Moreover, the ability of U.S. forces to use the final governing standards as a shield from host nation exercise of criminal jurisdiction over environmental offenses could depend largely on the actual or perceived gap, if any, between host nation legal requirements and the final governing standards themselves. In some nations with more embryonic environmental legislation or enforcement, such a disconnect may not present a problem. In a nation such as Germany (with advanced and

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Supplementary Agreement Impact].

<sup>172</sup> Revised Supplementary Agreement, *supra* note 59, Article 54B.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at Article 57.

<sup>175</sup> *Id.* at Article 63.

<sup>176</sup> The U.S. Army intends to incorporate the specific requirements into the Germany FGS. See Phelps, Supplementary Agreement Impact, *supra* note 171.



complex environmental legislation<sup>177</sup> as well as environmental criminal provisions<sup>178</sup>), the U.S. may find it difficult to rely on the Germany FGS for standards against which to assert jurisdiction over its forces, particularly after the ratification of the Revised Supplementary Agreement squarely requiring application of German law.

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<sup>177</sup> See Section IV, *infra*.

<sup>178</sup> Although criminal provisions *per se* do not exist in the final governing standards, it would be essential for the U.S. to have criminal provisions (and disciplinary provisions for civilian employees accompanying the forces) at its disposal to attempt to maximize U.S. jurisdiction over its forces committing environmental offenses, assuming the U.S. would be successful in asserting its final governing standards as the "sole compliance standard" for its forces.

#### IV. International Sensitivity to Environment Issues

##### A. Some Recent Events Focusing Attention on the Environment

The concept of nation-state responsibility to abate environmental damage caused in another sovereign's territory has been recently codified and publicized in the 1992 Rio Declaration on the Environment. This effort was a product of the celebrated United Nations Conference on the Environment and Development in Rio de Janeiro. It stated in part, "States have...the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States...."<sup>179</sup> The subject of heightened environmental sensitivity overseas should not be news to anyone.<sup>180</sup> A 1991 GAO Report concluded that such heightened concern had in turn brought the environmental practices of U.S. bases under greater scrutiny by host nation opposition political groups, the media, and

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<sup>179</sup> United Nations Convention on Biological Diversity, Jan. 5, 1992, 31 I.L.M. 818, 824.

<sup>180</sup> In Europe, for example, public awareness of environmental issues has developed as a result of the nuclear accident at Chernobyl, oil spills in the North Seas and the Mediterranean, chemical spills in the Rhine and other rivers, the acid rain problem in Central and Eastern Europe, the greenhouse effect, and the depletion of the ozone layer. As public awareness has fostered greater political debate, often initiated by the Green Party, politics and legislation have followed. See, e.g., William D. Montalbano, *Focus on Environment: Green Wave Surging Over West Europe*, L.A. TIMES, May 11, 1989, at A1; Mark Maremont, *And Now, the Greening of Europe*, BUS. WK., May 8, 1989, at 98D; Tyler Marshall, *Public Spurs Cleanup: West Europe Has Its Fill of Toxic Waste*, L.A. TIMES, Feb. 28, 1989 at A1; David Marsh, *Pollution Control: Lessons of the Rhine*, FIN. TIMES, Mar. 6, 1987, at 17. In South Korea, public accusations of corporate dumping in a river and a riot protesting the construction of a waste dump were unusually new occurrences in 1990. See David P. Hackett, *Environmental Regulation in South Korea*, INT'L ENVTL. L. SPECIAL RPT. 382, 384 (1992).

the public.<sup>181</sup> In fact, the entire DOD Directive 6050.16/OEBGD/FGS policy of abiding by more restrictive host nation standards, when they existed, seems designed to avoid the damaging of relations with host nations potentially resulting from a major pollution incident caused by U.S. forces not complying with foreign legal requirements stricter than U.S. requirements.<sup>182</sup>

### B. Legal Developments

Concurrent with the worldwide rise of political concern over environmental issues, particularly in highly industrialized countries where the U.S. has the majority of its overseas forces stationed,<sup>183</sup> there has been an overwhelming expansion in number and scope of environmental laws by these same host nations. Leading the way has been the EU which, through the process of directives and regulations binding on member nations, has surpassed even rigorous and comprehensive national legal systems such as those in Germany and the Netherlands.<sup>184</sup> EU law prevails over member nation law, and unlike the U.S. federal system

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<sup>181</sup> GAO Report on Overseas Bases, *supra* note 143, at 45, 48.

<sup>182</sup> *Id.* Legal officials at the U.S. European Command, U.S. Army Europe, U.S. Air Forces in Europe, and the Defense Logistics Agency-Europe all predicted such a reaction to GAO investigators due to continually growing environmental sensitivities.

<sup>183</sup> Of the 251,122 active duty military stationed in foreign countries, there are 87,955 in Germany, 45,398 in Japan, 36,796 in Korea, 13,781 in the United Kingdom, and 12,743 in Italy. DOD Military Manpower Statistics, Table 13 (Sep. 30, 1994). Of the 101,091 DOD civilian employees in foreign countries, there are 43,003 in Germany, 22,756 in Japan, 13,180 in Korea, 4,880 in Italy, and 2,301 in the United Kingdom. Of the 220,153 dependents overseas, roughly the same proportions apply in these countries. DOD Worldwide Manpower Distribution by Geographical Area, *supra* note 1.

<sup>184</sup> Smith & Hunter, *supra* note 71, at 10117, 10135. See the Single European Act, *supra* note 70, giving the EC substantial new authority in the field of environmental regulation. See also Gabrielle H. Williamson, *Environmental Enforcement and Compliance*

of environmental law, generally imposes different and more rigorous environmental requirements on member nations.<sup>185</sup> One commentator estimates that between one-third to one-half of all legislation necessary to implement the Single Internal Market of the EU consists of environmental or health and safety measures, many of which are specific and stringent enough to minimize member nation discretion in implementation.<sup>186</sup>

A rather unique feature to EU environmental practice, somewhat analogous to the citizen suit available under U.S. environmental law, has been the citizen complaint procedure, acting as a catalyst for more lethargic member nations to implement and enforce EU legislation.<sup>187</sup> Resolution of complaints made to the EU Commission (its administrative arm) is usually informal and confidential with the member nation<sup>188</sup>, but a 1988 European Court of Justice opinion allowed individuals to sue in their national courts to protect their rights when an EU directive has a direct effect on individuals.<sup>189</sup>

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*in the European Community*, INT'L ENVTL. L. SPECIAL REP. 34, 38-40 (1992).

<sup>185</sup> *Id.* It is anticipated, for example, that new EU environmental legislation may soon impact U.S. forces' activities at European bases in areas such as movement of hazardous materials. See, e.g., Wolfgang H. Motz, *European Union and US Military Activities* (1994), reprinted in Air Force JAG International Law Deskbook, *supra* note 165, at I-39, I-40.

<sup>186</sup> Williamson, *supra* note 185, at 45.

<sup>187</sup> See Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI.-KENT L. REV. 173, 187 (1992).

<sup>188</sup> *Id.* See also SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY 110-111 (1995).

<sup>189</sup> Smith & Hunter, *supra* note 71, at 10111; ROSE-ACKERMAN, *supra* note 188. U.S. forces' authorities and their EU member nation allies would be well advised to monitor this development closely for its potential impact on SOFA obligations concerning environmental compliance.

Sensitivity to the environment has also driven expanding national environmental legislation (apart from EU influences) in some EU member nations where U.S. forces are present. Probably the most comprehensive scheme of environmental regulation exists in Germany. In addition to the civil media statutes and the Federal Environmental Liability Act providing for strict liability for air, water or soil pollution,<sup>190</sup> the German Criminal Code provides for criminal liability for certain activities affecting these media.<sup>191</sup> The Criminal Code specifically imposes punishment for unauthorized contamination of waters, for adversely affecting the air in violation of a permit or administrative order, or for the unauthorized disposal of waste.<sup>192</sup> Maximum sentences include up to five years' imprisonment for intentional violations and up to two years imprisonment for negligent violations.<sup>193</sup> German prosecutors have become much more active in the last five years in their use of these provisions, and there is a growing concern among them that German government agencies have been too lenient in their environmental dealings with U.S. forces.<sup>194</sup>

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<sup>190</sup> Umwelthaftungsgesetz [UGB]. See Jarass & DiMento, *supra* note 167, at 65.

<sup>191</sup> Strafgesetzbuch [StGB]. For an analysis of these substantive provisions as they apply to U.S. forces in Germany, see Maxwell G. Selz, *German Environmental Law: A Primer*, ARMY LAW. (May 1992).

<sup>192</sup> *Id.* §§ 324, 325 and 326.

<sup>193</sup> *Id.*

<sup>194</sup> Telephone Interview with Wolfgang H. Motz, Command Host Nation Legal Advisor, U.S. Air Forces in Europe (Jun. 29, 1995) [hereinafter Motz interview]. An example cited by Mr. Motz of the increasing sensitivity and apprehension by the German government relates to U.S. forces' compliance with discharge (particularly wastewater) permits obtained for U.S. forces by the German Ministry of Defense (a practice specifically

Two Asian countries where the U.S. maintains significant forces, Japan and South Korea, have also experienced a large increase in the scope and complexity of their environmental laws. Far more than other Asian countries, Japan addresses environmental concerns through a regulatory system comparable to the U.S. Passed about the same time as U.S. statutes, national legislation in the areas of air emissions, wastewater, solid and hazardous waste, noise, and chemicals has been enacted.<sup>195</sup> Of more recent vintage has been the Japanese willingness to use their criminal enforcement provisions for any environmental pollution which may endanger the lives or health of the public.<sup>196</sup> Environmental protection in South Korea has only become an increasingly public issue in the late 1980's and 1990's in the wake of its industrial growth, and new media-based laws effective in February 1991 have begun to address environmental concerns on a more sophisticated level.<sup>197</sup>

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required in the Revised Supplementary Agreement, *supra* note 59, Article 53A). Given this arrangement, Germans themselves are concerned about becoming targets of German prosecution for permit noncompliance by U.S. forces.

<sup>195</sup> David P. Hackett, *Environmental Regulation in Japan*, INTL ENVTL. L. SPECIAL RPT. 329 (1992).

<sup>196</sup> *Id.* at 333.

<sup>197</sup> Hackett, *supra* note 180, at 382.

## V. Environmental Criminal Enforcement: Military Members

### A. Official Duty Status

SOFAs grant the primary right of exercising concurrent criminal jurisdiction to the U.S. as a sending State for "offenses arising out of any act or omission done in the performance of official duty."<sup>198</sup> The application of this provision has raised two questions in practice: (1) who makes the determination of whether an offense fits this definition such that the sending State has the primary right of jurisdiction, and (2) what is meant by the phrase "in the performance of official duty."<sup>199</sup> The NATO SOFA is silent on these issues<sup>200</sup>, and the application of this common provision in SOFAs has not been without controversy.<sup>201</sup>

As to who decides whether an offense arises out of the performance of official duty, the U.S. position has been that only the sending State is in a position to make this determination, and in practice, the U.S. has adhered to this position.<sup>202</sup> Some agreements

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<sup>198</sup> Section II.B.2., *supra*. See, e.g., NATO SOFA, *supra* note 19, Article VII, para. 3(a)(ii); Japan SOFA, *supra* note 24, Article XVII, para. 3(a)(ii); and Korea SOFA, *supra* note 24, Article XXII, para. 3(a)(ii).

<sup>199</sup> J. SNEE & K. PYE, *supra* note 32, at 46.

<sup>200</sup> The SOFA negotiators themselves disagreed on the meaning of this language, although commentators assert they did agree that what constitutes official duty is a matter for determination by the sending State. See, e.g., J. WOODLIFFE, *supra* note 33, at 179; S. LAZAREFF, *supra* note 6, at 175.

<sup>201</sup> Will H. Carroll, *Official Duty Cases Under Status of Forces Agreements: Modest Guidelines Toward a Definition*, 12 A.F. L. REV. 284 (1970).

<sup>202</sup> See, e.g., AFP 110-3, *supra* note 44, para. 19-19d. The mechanism for communicating this determination to a host nation is an "official duty certificate" signed by a commander or staff judge advocate of the offender's unit. *Id.*

make clear that the U.S. occupies this controlling position,<sup>203</sup> while in practice the courts of other countries, such as the United Kingdom, Italy and Turkey, have generally accepted the U.S. military authority's determination.<sup>204</sup>

What constitutes an offense arising in the performance of official duty has also on occasion been the subject of debate. As the concept is not usually defined in SOFAs,<sup>205</sup> and consistent with their policy of maximizing jurisdiction, U.S. authorities have adhered to the position that any act or omission occurring incidental to the performance of official duty is covered.<sup>206</sup> Host nations have sometimes disputed this assertion as overreaching in politically sensitive cases,<sup>207</sup> and an approach generally advocated among military practitioners has been whether the act or omission constituting the offense is reasonably

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<sup>203</sup> See, e.g., German Supplementary Agreement, *supra* note 49, Article 18, stating this determination "shall be made in accordance with the law of the sending State;" Agreed Minute to Article XVII, Japan SOFA, *supra* note 24, stating this determination made on a certificate by a commander "shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved;" and Agreed Minutes to Korea SOFA, *supra* note 24, Article XXII, stating this determination on a certificate by competent military authorities "shall be sufficient evidence of the fact for the purpose of determining primary jurisdiction."

<sup>204</sup> J. SNEE & K. PYE, *supra* note 32, at 50-54; Stanger, *supra* note 9, at 235-238.

<sup>205</sup> An exception exists in the Korea SOFA, *supra* note 24, Agreed Minutes to Article XXII, where the term official duty "is meant to apply only to acts which are required to be done as functions of those duties which the individuals are performing."

<sup>206</sup> J. SNEE & K. PYE, *supra* note 32, at 49.

<sup>207</sup> Perhaps the most famous example occurred with a guard in Japan who accidentally killed a Japanese woman with an empty shell from a grenade launcher. The commander issued an official duty certificate, but Japan resisted U.S. jurisdiction on the grounds that the guard had not acted within the purview of his duties. After a Japanese outcry, the U.S. waived whatever jurisdiction it had, creating an outcry in the U.S. Congress and ending in a Japanese prosecution and denial of a writ of habeas corpus. See *Wilson v. Girard*, 354 U.S. 524 (1957).



related to the duty to be performed and done in an effort to perform the duty (versus completely foreign and unrelated to the duty).<sup>208</sup> The U.S. has also specifically disfavored any analysis of specific intent crimes as not being eligible for official duty classification (although used in the past by host nations on occasion), since such an analysis ignores the broader SOFA terminology; i.e., "offenses *arising out of* any act or omission done in the performance of official duty."<sup>209</sup>

In the context of environmental offenses, one should be able to conclude with some certainty that cases involving environmental offenses through negligence by U.S. forces, whose duties are related to environmental protection (for example civil engineers or aircraft/vehicle maintenance shops in the handling and disposal of hazardous waste), fall under the official duty umbrella of U.S. primary jurisdiction. Of less certainty are offenses by this same category of personnel committing intentional (or knowing or reckless) violations. In both types of cases, offenses have been committed incident to the performance of a duty, although the political atmosphere and environmental sensitivity attending certain incidents could galvanize the host nation (especially in the absence of an agreement providing for U.S. resolution of the question) to make its own determination of official duty status as occurred in the *Girard*<sup>210</sup> case.

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<sup>208</sup> *Foreign Criminal Jurisdiction Historical Perspective*, JAG International Law Deskbook, *supra* note 165, at F-4; Carroll, *supra* note 201, at 287-288; AFP 110-3, *supra* note 44, para. 19-19j.

<sup>209</sup> See J. SNEE & K. PYE, *supra* note 32, at 48; Carroll, *supra* note 201, at 285-286.

<sup>210</sup> *Supra* note 207.

Lastly, an entire category of environmental offenses exists unrelated to the performance of any duty. For example, the soldier who changes his own automobile oil and dumps the waste oil down a sewer drain should not be found to have committed an offense arising out of an act in the performance of official duty. To do so would be tantamount to equating the official duty basis of primary jurisdiction with mere presence or status in connection with duties - clearly an illogical and unintended result.<sup>211</sup> Nevertheless, it is clear U.S. authorities would seek a waiver of host nation jurisdiction in this type of case, as well as issuing an official duty certificate (right or wrong). The real risk, beyond short term embarrassment if asked by the host nation how such an incident meets the SOFA official duty category, could well be the erosion of credibility of the official duty certificate in a more egregious case on its facts (such as a willful or reckless emission of a pollutant by a military member whose job related to the control or authorized discharge of such an emission) but much closer to a defensible application of SOFA official duty affording the U.S. the primary right to prosecute.

This entire discussion on the U.S. primary right to jurisdiction in official duty cases presupposes that U.S. authorities have a basis in the first place under military law to prosecute military members for environmental offenses committed. Indiscriminate requests for waivers are often made under the U.S. policy to maximize its jurisdiction without considering or analyzing the basis under which the U.S. military would prosecute these

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<sup>211</sup> See G. STAMBUK, *supra* note 25, at 73.

cases.<sup>212</sup> One must remember that there is a fundamental legal difference between requesting a waiver where the U.S. does in fact have a basis of concurrent criminal jurisdiction and requesting a "waiver" where it does not (in effect, simply a *nolle prosequi* or request not to prosecute at all) - the latter not being entitled to SOFA "sympathetic consideration."<sup>213</sup> While such a policy undoubtedly makes sense from the standpoint of consistency of military discipline and morale, authorities implementing this policy may easily lose sight of the need to be able to back up U.S. waiver requests with the basis of U.S. criminal prosecution (especially in cases of official duty where jurisdiction is blithely assumed).<sup>214</sup> Nowhere is this dangerous reality more apparent than in the area of environmental violations. The UCMJ's ability to address such offenses has fortunately been largely untested and unquestioned by host nation authorities, but it desperately needs studied reinforcement to

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<sup>212</sup> Virtually no policy or guidance exists for how commanders and their staff judge advocates are to charge and prosecute cases under the UCMJ for environmental offenses in the U.S. or overseas. There exists no policy letter from any of The Judge Advocates General of the three services concerning the charging of environmental crimes overseas. Telephone Interview with Loren Perlstein, Deputy Chief, Air Force Military Justice Division, Bolling Air Force Base, Washington D.C. (Jul. 13, 1995). Moreover, some U.S. authorities are increasingly apprehensive about host nations asking (or being forced by political circumstances to ask) the U.S. for its statutory basis of concurrent criminal jurisdiction over its forces in environmental cases, fearing the answer could be embarrassing. Motz Interview, *supra* note 194.

<sup>213</sup> J. SNEE & K. PYE, *supra* note 32, at 31. See Section I.B.2. and note 36, *supra*.

<sup>214</sup> See, e.g., German Supplementary Agreement, *supra* note 49, Article 17, para. 1, providing that a German court or authority dealing with a case may request a certificate stating whether or not the act is punishable by the law of the sending State; U.S. Sending Office for Italy Instruction 5820.1B, *Operating Procedures in Italy under Article VII, NATO Status of Forces Agreement* (on file with the U.S. Sending State Office, Rome, Italy), providing at para. 14c(2) that requests for waiver of jurisdiction must not imply the U.S. can exercise criminal jurisdiction if it cannot.

serve as the basis for U.S. military concurrent jurisdiction over environmental offenses. Without an application that will withstand appeal in military courts and the U.S. Supreme Court, the U.S. simply has no concurrent jurisdiction, whether environmental crimes are committed in the performance of official duty or not.

## B. Bases of UCMJ Jurisdiction: Theory

### 1. Dereliction of Duty

Article 92, Clause 3, UCMJ,<sup>215</sup> provides for criminal liability for dereliction of duty. The offense of dereliction of duty requires: (1) that a person had certain duties; (2) that the person knew or reasonably should have known of the duties; and (3) that the person was willfully or through neglect or culpable inefficiency derelict in the performance of those duties.<sup>216</sup> A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.<sup>217</sup> Actual knowledge of a duty need not be shown if the person reasonably should have known of his duties, which may be demonstrated by, for example regulations and training.<sup>218</sup>

The potential application of this punitive article to derelictions by military members relating to their environmental responsibilities seems obvious. As noted however in Section III.B.1., *supra*, before the OEBGD and final governing standards, specificity of environmental compliance by U.S. forces overseas was lacking and justifiably criticized.

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<sup>215</sup> UCMJ, *supra* at note 105, § 892, Clause 3 [hereinafter Article 92(3)].

<sup>216</sup> MCM, *supra* note 110, para. 16b.(3).

<sup>217</sup> *Id.*, para 16c.(3).

<sup>218</sup> *Id.*

Vague and broad pronouncements by the President in E.O. 12,088 could not serve as the basis for a specific, articulable duty for purposes of Article 92(3). In addition, the SOFA treaty obligation of sending State forces to "respect" host nation law is much too vague, absent a U.S. forces regulation implementing some specific provision of the SOFA, to constitute the basis of an Article 92(3) dereliction of duty prosecution.<sup>219</sup>

The OEBGD and the first U.S. attempt at minimum substantive compliance standards based on U.S. law would have been a promising source of the duty necessary to prosecute environmental offenses under Article 92(3), but for the following language: "This document does not create any rights or obligations enforceable against the United States, DOD, or any of its services or agencies, *nor does it create any standard of care or practice for individuals*" (emphasis added).<sup>220</sup> Such language seems curiously at odds with DOD's OEBGD strategy and policy "to be on the forefront of environmental compliance and protection,"<sup>221</sup> but underscores one of the themes of this article that harmonizing the new compliance scheme with enforcement (particularly under SOFA allocations on enforcement jurisdiction) was simply not considered.<sup>222</sup> Unfortunately compounding this problem in the

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<sup>219</sup> See *US Environmental Law Overseas*, JAG International Law Deskbook, *supra* note 165, at VI-14. There are no reported cases in the military reporters discussing a treaty obligation alone as the basis of a duty for purposes of Article 92. Cf. UCMJ prosecutions under Article 92 for violating customs regulations promulgated to implement SOFA customs provisions. See, e.g., *United States v. Koh*, 27 M.J. 710 (A.C.M.R. 1988).

<sup>220</sup> OEBGD, *supra* note 148, at 1-3.

<sup>221</sup> *Id.*

<sup>222</sup> A possible exception to this criticism could be the Environmental Subcommittee established pursuant to the Korea SOFA, *supra* note 24, Article XXVI, to study issues and make recommendations to the U.S.-Republic of Korea SOFA Joint Committee concerning

OEBGD<sup>223</sup> has been the incorporation of such exculpatory language into some of the final governing standards (FGS). For example the Korea FGS draft<sup>224</sup>, the final Japan FGS<sup>225</sup>, and the final Italy FGS<sup>226</sup> incorporate the OEBGD language on individual responsibility verbatim. Since Chapter 1 of most country final governing standards incorporate much of the OEBGD Chapter 1 "boilerplate" verbatim, one wonders whether this language precluding use of Article 92(3) for dereliction of duty on the basis of OEBGD or certain FGS noncompliance was intentional or an oversight. The apparent nonbinding nature evidently led the U.S. Navy Comptroller recently took the position that OEBGD and FGS standards are not "legal requirements" for purposes of funding overseas environmental compliance.<sup>227</sup> Can the standards not be binding legal requirements for federal funding but still be binding on federal servants?

The hope among some that the FGSs would constitute the requisite source of duty

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environmental matters, specifically referenced in the Korea FGS Draft, *infra* note 224, para. 1-10a. Such a mechanism at least provides the vehicle for meshing FGS violations with allocations of criminal jurisdiction.

<sup>223</sup> The author has been unable in the course of numerous interviews with DOD officials to ascertain the purpose of this exculpatory language in the OEBGD.

<sup>224</sup> Korea FGS Draft, para 1-4c (on file with U.S. Forces Korea, Assistant Chief of Staff, Engineer) (drafted by an Army-Navy-Air Force interservice committee).

<sup>225</sup> Japan FGS, para 1-5 (Jan. 1995) (on file with U.S. Forces Japan, Office of the Civil Engineer) (drafted by an Army-Navy-Air Force interservice committee).

<sup>226</sup> Italy FGS, para. 1-1D (Apr. 27, 1994) (on file with U.S. European Command, Office of the Legal Advisor) (drafted by the U.S. Navy as EA).

<sup>227</sup> See *supra* note 159.

for an Article 92(3) dereliction prosecution<sup>228</sup> could be realized through FGSs if they were without this exculpatory language,<sup>229</sup> since they pick up OEBGD directive language requiring military departments, and particularly installation commanders, to "comply with the FGS." Further, the FGSs for the United Kingdom and Turkey actually contain positive language referencing individual responsibility and environmental duties.<sup>230</sup> The author of this FGS language specifically intended to make violations of the FGSs for these countries punishable under Article 92(3) as a dereliction of duty.<sup>231</sup> If DOD is as serious as it claims to be in its pronouncements about being at the forefront of environmental compliance at its overseas bases, then it should ensure its EAs who are responsible for drafting final governing standards utilize language assisting, not crippling, the military prosecution of environmental offenses violating these standards.

Besides the elements of duty and a violation thereof, no discussion of Article 92(3)

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<sup>228</sup> See, e.g., *US Environmental Law Overseas*, JAG International Law Deskbook, *supra* note 165, at VI-14.

<sup>229</sup> The Germany FGS Draft, *supra* note 159, does not contain this disabling language. Phelps Interview, *supra* note 159.

<sup>230</sup> The United Kingdom FGS, para. 1-3E (Jan. 1, 1994) [hereinafter UK FGS] and the Turkey FGS, para. 1-3E (Mar. 1, 1994) [hereinafter Turkey FGS] (on file with the U.S. Air Forces in Europe, Office of the Staff Judge Advocate) (drafted by the U.S. Air Force as EA) provide:

"Individual members or employees of the Department of Defense will: 1. Take action to ensure their conduct, and that of their subordinates and dependents, results in no discharge, deposit or release of substances, or other effects that cause harm to the environment or the natural and cultural resources of [the host country] unless it is in conformance with these final governing standards."

<sup>231</sup> Rodgers Interview, *supra* note 160. Lt Col Rodgers also seems to have succeeded in encompassing environmental violations not related to performance of duty, such as the case of a soldier dumping his used oil down a sewer drain.

dereliction would be complete without mentioning the element of knowledge of those duties. Training is often an essential method of proving a defendant's actual knowledge (or that he should have known) of his duties. All of the FGSs have facilitating language to the effect of requiring installation commanders to "develop and conduct training/education programs to instruct all personnel in the environmental aspect of their jobs and the requirements of the final governing standards."<sup>232</sup> DOD has a unique turnover problem regarding training of its military members who generally stay less than three to five years at an overseas installation. The significance of this training difficulty becomes apparent when looking at DOD environmental compliance failures, most of which are related to "people processes" and attention to detail in areas such as handling and disposal of hazardous waste.<sup>233</sup> Criminal prosecution as a compliance incentive may be one of the only ways DOD may overcome an institutional problem of leadership and training in an effort to encourage a transient force to "do the right thing" and prevent future well-meaning conversions of civil cases into criminal cases.<sup>234</sup>

In addition to training, required reports generated by a defendant or his duty section

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<sup>232</sup> See, e.g., UK FGS, *supra* note 230, para. 1-3D.2. See also Italy FGS, Chapter 6, Appendix A, *infra* at 6-19 to 6-21 for examples of specific training requirements.

<sup>233</sup> Laurent R. Hourclé, Lecture at Federal Facilities Environmental Law Issues Course, National Law Center, George Washington University (Mar. 30, 1995). Accord Rathgeber Interview, *supra* note 144, discussing the most common reasons for Notices of Violation from the U.S. Environmental Protection Agency for DOD bases in the U.S..

<sup>234</sup> *Id.* See also Margaret K. Minster, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case for Criminal Prosecution of Federal Employees*, 18 HARV. ENVTL. L. REV. 137 (1994).



constitute another source probative of a defendant's knowledge of his duties. Reports concerning FGS compliance are currently required by one of the military departments.<sup>235</sup> The UK and Turkey FGSs actually go well beyond this reporting requirement by requiring individual members or employees of DOD to "report to superior authority any condition, event or practice that is not in conformity with the final governing standards."<sup>236</sup> Such an approach further solidifies the viability of an Article 92(3) dereliction prosecution for not complying with an underlying substantive duty or not reporting the failure by another member of the U.S. forces to comply with that FGS duty.<sup>237</sup>

## 2. Failure to Obey a Lawful General Order or Regulation

Article 92, Clause 1, UCMJ<sup>238</sup> provides for criminal liability for the failure to obey a certain class of orders or regulations. This offense requires (1) that there was in effect a certain lawful general order or regulation; (2) that the defendant had a duty to obey it; and (3) that the defendant violated or failed to obey the order or regulation.<sup>239</sup> Unlike the offense of dereliction or the other offense under Article 92 of violating other regulations<sup>240</sup>, Article

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<sup>235</sup> AFI 32-7006, *supra* note 161, Chapter 6.

<sup>236</sup> UK FGS and Turkey FGS, *supra* note 230, para. 1-3E.2.

<sup>237</sup> Another potential UCMJ punitive article lending itself to false reporting is Article 107, UCMJ, for making false official statements.

<sup>238</sup> UCMJ, *supra* note 105, § 892, Clause 1 [hereinafter Article 92(1)].

<sup>239</sup> MCM, *supra* note 110, para. 16b.(1).

<sup>240</sup> UCMJ *supra* note 105, § 892, Clause 2, likewise punishes the violation of "other" regulations if the defendant had knowledge of the regulation he disobeyed. While such "nonpunitive" regulations incorporating portions of an FGS could be issued, Articles 92(1) and 92(3) are better suited as vehicles to ensure U.S. concurrent jurisdiction for

92(1) requires no proof of a defendant's knowledge of a regulation.<sup>241</sup> Because of this "strict liability" feature of this offense, the percentage of military regulations falling into this category is relatively small, and such regulations are strictly construed similar to a penal statute.<sup>242</sup> Regulations meeting Article 92(1) must be "punitive" (i.e., cannot simply specify general guidelines<sup>243</sup>), must evince the punitive nature in a self-evident manner in the regulation<sup>244</sup> (e.g., specifying that violations of certain portions will subject military members to UCMJ prosecution), and must be generally issued by a general officer in command of a unit (or higher authority such as the President, Secretary of Defense, or Secretary of a military department).<sup>245</sup>

Almost none of the FGSs mention the subject of enforcing environmental compliance with the standards contained within them through the vehicle of a regulation. The Japan FGS, however, specifically leaves open this possibility by providing: "These standards are not issued as a punitive directive. Installation and activity commanders are authorized, however, to issue punitive orders to implement these standards."<sup>246</sup> To date, no punitive

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environmental offenses.

<sup>241</sup> *Id.* para. 16c.(1)(c).

<sup>242</sup> *See* United States v. Sweitzer, 33 C.M.R. 251 (C.M.A. 1963).

<sup>243</sup> MCM, *supra* note 110, para. 16c.(1)(e).

<sup>244</sup> *See* United States v. Nardell, 45 C.M.R. 101 (C.M.A. 1972).

<sup>245</sup> MCM, *supra* note 110, para. 16c.(1)(a).

<sup>246</sup> Japan FGS, *supra* note 225, para. 1-9.3.

general regulations have been issued addressing violations of any FGS.<sup>247</sup> Nonetheless, at least one military environmental law practitioner in Europe has recommended that the portions of European countries' FGSs relating to hazardous waste be made punitive for Air Force members by the Commander, U.S. Air Forces in Europe.<sup>248</sup> Such a measure appears particularly warranted by eligible commanders in countries such as Italy where the FGS EA has handicapped U.S. military authorities from asserting UCMJ jurisdiction on the basis of the FGS alone.<sup>249</sup> Making conduct violative of an FGS punitive by regulation does not run afoul of the concern that the U.S. should not issue punitive regulations punishable under Article 92(1) solely for the purpose of preventing foreign criminal jurisdiction.<sup>250</sup>

### 3. Service Discrediting Conduct and Damage to Real Property

Article 134, Clause 2, UCMJ,<sup>251</sup> the "General Article," provides for criminal liability for a category of offenses not specifically covered in any other punitive article, punishing

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<sup>247</sup> Rathgeber Interview, *supra* note 144.

<sup>248</sup> Phelps Interview, *supra* note 159. Lt. Colonel Phelps believes that the entire regulation should not be made punitive yet, but that a prudent start would be the area of most problems in the U.S. and overseas - the handling of hazardous waste. *Id.*

<sup>249</sup> Perhaps the simplest way to make standards punitive is to specifically provide that violations of certain requirements (e.g., for Italy, the hazardous waste requirements set forth in Chapter 6 of the FGS - *see* Appendix A, *infra*) are punishable under Article 92 of the UCMJ. A country-wide regulation issued by a general officer with command authority over all of a military department's installations in that country (e.g., the Commander, U.S. Air Forces in Europe, or the Commander, 16th Air Force, for all Air Force installations in Italy) would be preferable to a patchwork of installation-by-installation regulations.

<sup>250</sup> *See* J. SNEE & K. PYE, *supra* note 32, at 31. An example of such a concern would be the issuance of punitive military regulations for minor traffic infractions committed off an installation when the U.S. interest in exercising jurisdiction is relatively slight.

<sup>251</sup> UCMJ, *supra* note 105, § 934, Clause 2 [hereinafter Article 134(2)].

conduct of a nature to bring discredit upon the armed forces (by injuring the reputation or tending to lower the reputation of the armed services in public esteem).<sup>252</sup> Pursuant to this article, acts in violation of foreign law may be punished if proof beyond a reasonable doubt exists that such an act is of a nature to bring discredit on the armed forces.<sup>253</sup> Commentators have noted the potentially wide swath cut by this provision giving the U.S. jurisdiction over any case violating receiving State law.<sup>254</sup> The military case law interpreting the scope of this provision has held that violations of foreign law *per se* are not punishable under Article 134(2).<sup>255</sup> Use of this theory of criminal liability hardly appears in the military justice reporters, probably due to the fact that specific punitive articles, when covering an act or omission, are easier to prove.

In any event, the most attractive use of Article 134(2) may well be for environmental offenses committed off an overseas installation where an FGS will not apply.<sup>256</sup> The

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<sup>252</sup> MCM, *supra* note 110, para. 60c.(3).

<sup>253</sup> *Id.*

<sup>254</sup> See J. WOODLIFFE, *supra* note 33, at 177; J. SNEE & K. PYE, *supra* note 32, at 25.

<sup>255</sup> See, e.g., *United States v. Hughes*, 7 C.M.R. 803, 811 (A.F.B.R. 1953) (violations of British vehicle registration laws without an allegation of circumstances showing injury to the reputation of the armed forces by these minor misdemeanors was not a violation of Article 134); *United States v. Singleton*, 15 M.J. 579, 581-582 (A.C.M.R. 1983) (although every breach of an allied country's law is not an offense under Article 134, violation of German law on the importation of illegal drugs does cause the services to suffer a loss of esteem and is an Article 134 offense).

<sup>256</sup> The OEBGD "applies to DOD installations" overseas and also specifically excludes the application of its provisions to "operational and training deployments off-base." OEBGD, *supra* note 148, at 1-1. Following this lead, every FGS applies only to DOD installations in that particular country and also excludes any off-base deployments. Such

commission of the offense within the host nation community itself, possibly depending on how egregious the offense is viewed by the local community, should give the U.S. a basis to prosecute.<sup>257</sup> Ironically, the more political pressure brought to bear upon a particular case by a host nation to prosecute under its laws, the stronger the U.S. argument for exercising its jurisdiction under Article 134, especially in an official duty case.

Finally, Article 109, UCMJ,<sup>258</sup> may afford the U.S. a basis for military jurisdiction when Articles 92 and 134 are not legally available or in conjunction with these charges. Article 109 provides for criminal liability for willfully or recklessly wasting or spoiling or otherwise willfully and wrongfully destroying or damaging any property other than military property of the U.S. The property referred to includes any real property not owned by the U.S.; wasting or spoiling refers to acts of voluntary destruction or permanent damage such as cutting down trees; damaging refers to any damage and must be done intentionally and contrary to law, regulation, lawful order or custom.<sup>259</sup> Of particular application to environmental offenses committed on or off an installation is the provision regarding damage to real property (the host nation owns the installation, and real property off the installation is owned by a host nation or subordinate government or private persons). The *scienter*

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deployments are to be governed by an environmental annex to the deployment plan which could of course include provisions enabling the application of Article 92, but such deployment plans are not drafted under the compliance umbrella of the FGS.

<sup>257</sup> An excellent example of such a case that occurred in Germany is discussed in Section V.C., *infra* notes 272, 277 and accompanying text.

<sup>258</sup> UCMJ, *supra* note 105, § 909 [hereinafter Article 109].

<sup>259</sup> MCM, *supra* note 110, paras. 33c.(1) and (2).

requirement is high, but similar to Article 134(2), the more notorious the case (here due to a U.S. military member's conduct), the better chance the U.S. has of asserting criminal jurisdiction under Article 109.

### C. Bases of UCMJ Jurisdiction: Practice

Very few cases have occurred in which U.S. military authorities have been confronted with (or have analyzed) the issue of UCMJ disposition of environmental offenses committed by U.S. forces. Of the handful of cases where records or recollections of these events exist, all such cases have occurred in Europe. None of these incidents resulted in a court-martial, and in that respect, the U.S. forces' record overseas approximates the U.S. military's record within the United States.<sup>260</sup>

In 1989, two cases arose where host nation authorities indicated they wished to prosecute installation commanders for undisputed environmental violations occurring on those installations. The first case, occurring at Sembach Air Base, Germany, involved two violations of German environmental laws determined by German inspections of the base. One violation involved an auto junkyard with vehicles leaking oil and antifreeze into the ground; the inspector informed the U.S. employee accompanying him that the junkyard was illegal, but the employee apparently never passed this word through the chain of command,

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<sup>260</sup> There has been one known court-martial relating to environmental offenses in the U.S. In *United States v. Woodward*, an unreported case, the defendant was convicted of falsifying documents regarding the disposition of hazardous waste and improperly disposing of such waste into a dumpster (receiving a sentence of 75 days' confinement, forfeiture of \$500 pay per month for two months, and a reduction of two enlisted grades). See Orval Nangle, *Marine Corps Officer and Employee Liability for Environmental Noncompliance*, 3 FED. FACILITIES ENVTL. J. 433, 442 (1992-93).

and the installation commander allowed the junkyard to operate.<sup>261</sup> The second violation involved a fire training pit area with no leachate protection, and German officials requested U.S. authorities at the base to install a ground protection system complying with German law.<sup>262</sup> In both instances, no apparent efforts were taken by U.S. authorities to remedy either problem despite subsequent German requests, and the German prosecutor opened a criminal investigation as a means of forcing compliance but not with the objective of a criminal proceeding against the commander who had already transferred back to the U.S.<sup>263</sup> The case was released back to the U.S. (the Germans assuming on their own that the case involved official duty), and no disciplinary action was taken against any U.S. personnel.<sup>264</sup>

The second case, occurring at Aviano Air Base, Italy, involved a spill on the installation of about 1,200 gallons of aviation fuel occurring during a transfer of fuel.<sup>265</sup> Italian authorities expressed interest in prosecuting the commander and requested

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<sup>261</sup> Motz Interview, *supra* note 194.

<sup>262</sup> *Id.* See also GAO Report on Overseas Bases, *supra* note 143, at 47.

<sup>263</sup> Motz Interview, *supra* note 194. The criminal investigation was dropped when U.S. officials took action responsive to the German requests to comply with German environmental laws.

<sup>264</sup> *Id.* Mr. Motz opined that the case might have been different if the Germany FGS had existed, and noted that this case is a classic example of the host government not asking the very potentially embarrassing questions of the basis of concurrent jurisdiction by the U.S. (he thinks none really existed then) and why the U.S. did nothing to the commander or anyone else after its efforts to seek jurisdiction of the case. Fortunately, the Germans in that case were satisfied with eventual U.S. compliance.

<sup>265</sup> GAO Report on Overseas Bases, *supra* note 143, at 47. Letter from Major R. Philip Deavel, Staff Judge Advocate, to Aviano Air Base Commander (Oct. 5, 1992) (on file with the U.S. Sending State Office, Rome, Italy) [hereinafter Deavel letter].

information from U.S. forces as to the names of anyone responsible for the spill.<sup>266</sup> U.S. authorities, in a response graphically illustrating the disconnect between host nation environmental issues and complacent SOFA practice, denied the Italians' request for information, stating the U.S. had the primary right of jurisdiction and that Italian attempts to investigate or punish individual Air Force members for dereliction of duty were "beyond the scope of Italian jurisdiction."<sup>267</sup> In a revival of interest in this case reflecting increased environmental sensitivity, the Italian Ministry of Grace and Justice recently requested what action had been taken against any U.S. forces for the fuel spill.<sup>268</sup> In a response typifying the problem with the U.S. policy of maximizing its criminal jurisdiction and then not taking any action on a case, the U.S. Sending State Office responded that the Air Force had taken no disciplinary action against the installation commander or anyone else, since they "bore no criminal liability for the fuel spill."<sup>269</sup> Although the U.S. avoided having to answer the questions of its basis for asserting primary concurrent jurisdiction and specifically why no action was taken against anyone for a substantial spill in these two 1989 cases, U.S. military

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<sup>266</sup> Deavel Letter, *Id.* Motz Interview, *supra* note 194.

<sup>267</sup> Letter from Aviano U.S. Commander to Aviano Italian Commander (Oct. 7, 1992) (on file with the U.S. Sending State Office, Rome, Italy). No record exists in this pre-OEBGD/FGS case of the basis for assuming the U.S. possessed concurrent jurisdiction for dereliction of duty if a culpable person would have been found.

<sup>268</sup> Telephone Interview with Major William Gampel, Deputy Officer in Charge, U.S. Sending State Office, Rome, Italy (Jun. 27, 1995) [hereinafter Gampel Interview]. According to Major Gampel, such a request by the Italian government is very rare, particularly when the request was made almost six years after the incident.

<sup>269</sup> Letter from Major S. Lane Throssell, U.S. Sending State Office, to Ministry of Grace and Justice (Apr. 26, 1995) (on file with U.S. Sending State Office, Rome, Italy).



authorities working SOFA waivers or overseas environmental compliance would do well to remember that these cases occurred against the backdrop of a still divided Germany, a Warsaw Pact, and a Soviet threat.

Two cases in Germany within the last few years involving the dumping of oil into storm drains resulted in Article 15, UCMJ, nonjudicial punishment.<sup>270</sup> One incident at Hahn Air Base was charged under Article 92(2) for violation of a military housing regulation, and one incident off Rhein-Main Air Base was charged as a violation of Article 109 for damage to real property.<sup>271</sup>

In 1994, an Air Force officer stationed at Ramstein Air Base, Germany, who was in charge of a vehicle convoy during a training deployment on the German autobahn, ordered the fuel in a poorly running vehicle to be drained into a sewer drain.<sup>272</sup> Aggravating his conduct was being informed by his subordinates that the draining was against German law and his direction to surround the vehicle being drained with other military vehicles to obstruct the public's view of the incident.<sup>273</sup> The disposition of the case by the Ramstein Air

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<sup>270</sup> UCMJ, *supra* note 105, § 815. This procedure provides authority to a commander to nonjudicially punish within specified limits members in her command for violations of punitive articles of the UCMJ, and the member notified of this intent has the right to request a trial by court-martial of the charges.

<sup>271</sup> Telephone Interview with James Marlow, 17th Air Force, Chief of International Law, Sembach Air Base, Germany (Jul. 10, 1995).

<sup>272</sup> See Air Force Office of Special Investigations (AFOSI) Report 94541D26-S750142 (on file at AFOSI Investigative Operations Center, Environmental Crimes Division, Bolling Air Force Base, Washington D.C.) [hereinafter AFOSI Environmental Crimes Division].

<sup>273</sup> *Id.*

Base Office of the Staff Judge Advocate (SJA) is a classic study in the problems experienced in applying the UCMJ to environmental offenses overseas. First considering Article 92(1) and (2), no regulations existed proscribing this conduct.<sup>274</sup> As to Article 92(3), the Germany FGS<sup>275</sup> would have established a duty not to drain fuel into a sewer, but was not yet effective (and the SJA concluded that the OEBGD standards had not been given the training and command emphasis to establish the officer's knowledge of those standards<sup>276</sup>). Articles 134(2) and 109 were considered but there was insufficient command interest in proceeding with Article 15 nonjudicial punishment and in fully determining whether the conduct violated German environmental law.<sup>277</sup> A noteworthy aftermath was that the German

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<sup>274</sup> Telephone Interview with Major William Groves, Deputy Staff Judge Advocate, Ramstein Air Base, Germany (Jul. 6, 1995).

<sup>275</sup> Proper and thorough investigation of environmental violations by U.S. forces' investigators is another foundation to the ability to prosecute such cases under the UCMJ. Unfortunately, the few reported overseas environmental cases investigated by AFOSI in the UK since the beginning of 1994, for example, apparently failed to always consider the UK FGS's, *supra* note 230, impact on investigations for Article 92(3) violations (cases on file at AFOSI Environmental Crimes Division).

<sup>276</sup> An instructive comparison is one of the few military cases involving environmental offenses in the U.S. to go to an Article 32, UCMJ, hearing (analogous to a civilian grand jury proceeding) occurred at Tyndall Air Force Base, Florida, in Dec. 1992. The Investigating Officer recommended that case not be disposed of by court-martial in substantial part because of the lack of any meaningful training or education program and the lack of command emphasis on hazardous waste disposal requirements evincing any proof of the accused's alleged knowledge of his duties under Article 92(3) (Report on file with Investigating Officer, Lieutenant Colonel P. Michael Cunningham, Staff Judge Advocate, Dover Air Force Base, Delaware).

<sup>277</sup> *Id.* As noted in Section V.B., *supra* note 257, this case would have been a suitable set of facts for the use of Article 134(2) if any German law had been violated or for the use of Article 109 intentional damage to property if the draining was wrongful under German law.

authorities did inquire about the U.S. disposition of the case (an administrative written counseling) only after a U.S. subordinate of the offender informed the Germans of the incident.<sup>278</sup>

The FGSs and regulations and training conducted pursuant to them will add considerably to the U.S. ability to exercise criminal jurisdiction over its forces committing environmental offenses (at least on an installation). A recommended starting point to make the UCMJ a useful tool of this policy would consist of removal of exculpatory language from the OEBGD and all FGSs, punitive general regulations concerning most violated FGS standards (possibly matching the standards host nation authorities have the most interest in), and the actual implementation of a comprehensive training regimen called for in FGSs. Finally, U.S. military commanders must use the UCMJ in appropriate cases to handle environmental offenses if the U.S. wishes to credibly defend and preserve its policy of maximizing criminal jurisdiction in a sensitive area.

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<sup>278</sup> In perhaps the most famous prosecution of a federal employee for environmental violations, *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) ("the Aberdeen case"), an employee informed the installation environmental coordinator of the violations that ultimately formed the basis for the indictment, and when the violations continued, this "whistleblower" went to the *Baltimore Sun* and Maryland State Police. See James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279, 325 (1991). As the Ramstein case illustrates, U.S. forces overseas are clearly not exempt from this source of disclosure, creating additional pressure on U.S. authorities to be able to exercise criminal jurisdiction themselves.

## VI. Environmental Enforcement: Civilian Employees

### A. Exercise of U.S. "Jurisdiction" over the Civilian Component<sup>279</sup>

As discussed in Section III.A.3., *supra*, the U.S. Supreme Court has held unconstitutional the exercise of UCMJ jurisdiction over civilians accompanying U.S. forces overseas. The effect of these decisions is to deprive the U.S. of any concurrent jurisdiction it once had under SOFA provisions allocating jurisdiction.<sup>280</sup> The basis for this conclusion comes from the language of the SOFAs specifying and allocating jurisdiction by *military* authorities over persons subject to *military* law of a sending State.<sup>281</sup> With the taking away of concurrent jurisdiction by U.S. military authorities over civilians by the Supreme Court, the SOFA provisions regarding waivers and the primary right to exercise jurisdiction in official duty cases became equally inapplicable.<sup>282</sup>

In practice, U.S. authorities have continued to exercise the policy of attempting to maximize U.S. "jurisdiction" over its civilians committing offenses overseas<sup>283</sup>, leading to

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<sup>279</sup> Beyond the scope of this article is an analysis of civilian dependents and host nation civilian employees working for U.S. forces. Civilian dependents are covered by SOFA provisions and fall within the U.S. policy of maximizing its jurisdiction, and local national employees are not covered by SOFAs and remain fully subject to host nation laws.

<sup>280</sup> See, e.g., G. DRAPER, *supra* note 25, at 140; J. SNEE & K. PYE, *supra* note 32, 41; J. WOODLIFFE, *supra* note 33, at 176; Lepper, *supra* note 14, at 180.

<sup>281</sup> See, e.g., NATO SOFA, Article VII, paras 1(a) and 2(a), *supra* notes 27 and 29.

<sup>282</sup> See, e.g., G. DRAPER, *supra* note 25, at 53. See also AFP 110-3, *supra* note 44, para. 19-19i ("There being no concurrent jurisdiction, there is no longer a basis in the SOFA provisions for the issuance of a duty certificate for a civilian employee.").

<sup>283</sup> Motz Interview, *supra* note 194; Gampel Interview, *supra* note 268. The SOFA Tri-Service Regulation, *supra* note 40, provides: "In all cases in which the local

some confusion regarding both their basis for doing so<sup>284</sup> and their options for handling these cases.<sup>285</sup> The practical if not legal efficacy of this policy has depended upon U.S. authorities ability to credibly administer a program of administrative discipline for violations of host nation law.<sup>286</sup> So far, U.S. authorities have not been asked about their failure to take criminal action against U.S. civilians committing crimes in host nations, due in large part to a recognition by host nation authorities that the U.S. possesses no other way to handle these cases.<sup>287</sup> Since the Supreme Court removed this ability, however, there has been an interesting shift in attitude among U.S. authorities responsible for handling civilian misconduct. In 1957, overseas commanders believed that "discipline would be disrupted,

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commanders determine that suitable corrective action can be taken under existing administrative regulations, they may request the local foreign authorities to refrain from exercising their jurisdiction." As a practical matter, this charter has meant virtually any case. See discussion, *supra* note 40.

<sup>284</sup> Occasionally, commanders and their legal advisors will attempt to assert the position that the language "criminal and disciplinary jurisdiction" in SOFAs (*see, e.g.*, NATO SOFA, Article VII, para. 1(a), *supra* note 27) implies actual concurrent jurisdiction. Rodgers Interview, *supra* note 160. Even commentators occasionally confuse the issue by speaking of U.S. requests for "waivers in civilian cases, where the receiving state has the primary right" (*see* Parkerson & Stoehr, *supra*, note 65, at 48, n.32), when in fact such requests are simply requests to the receiving state to refrain from the exercise of its *exclusive* right by not prosecuting at all. See J. SNEE & K. PYE, *supra* note 32, at 31, and *supra* note 213.

<sup>285</sup> Technically under the SOFAs, the only options are the relinquishment by the receiving State of its exclusive jurisdiction to prosecute (whether U.S. forces take administrative action or not, although the exercise of such action may as a practical matter influence the host nation's decision) or host nation prosecution). G. DRAPER, *supra* note 25, at 26.

<sup>286</sup> See Lepper, *supra* note 14, at 180.

<sup>287</sup> Motz Interview, *supra* note 194.

morale impaired and ability to perform the assigned mission reduced" if UCMJ jurisdiction over civilians was denied.<sup>288</sup> Since that time U.S. officials have found themselves defending (sometimes awkwardly) the adequacy of administrative actions<sup>289</sup> to preclude exercise of host nation jurisdiction.<sup>290</sup>

In the context of environmental offenses, the FGS system should go a long way toward providing U.S. officials a basis to discipline civilian employees overseas for environmental violations.<sup>291</sup> As has been the case with U.S. military forces, there have been very few reported cases of environmental violations committed by civilians accompanying U.S. forces. Two U.S. Army civilians in Germany were criminally cited by German prosecutors for groundwater contamination from a race track and auto junkyard, but "jurisdiction" was transferred to U.S. authorities at their request, and the case was disposed of administratively.<sup>292</sup> In the late 1980's, two U.S. Army local national civilians were

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<sup>288</sup> Government Trial Brief 79, McElroy case, *supra* note 122; *see also* G. DRAPER, *supra* note 25, at 28.

<sup>289</sup> Disciplining U.S. civilian employees is governed by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), codified as amended in scattered sections of 5, 10, 15, 28, 31, 39 & 42 U.S.C. (1994). This Act creates two types of disciplinary actions for a federal agency to take against federal employees: Chapter 43 actions for unacceptable performance (*see* 5 U.S.C. §§ 4301-4315) and Chapter 75 actions for misconduct to promote the efficiency of the service (*see* 5 U.S.C. §§ 7501-7514).

<sup>290</sup> Motz Interview, *supra* note 194.

<sup>291</sup> As discussed in the context of the UCMJ, FGSs with exculpatory language for individual responsibility should be changed to remove such language or supplemented by regulations. Moreover, supervisors of civilian employees with environmental duties would be well advised to incorporate any FGS standards into those employees' performance plans (creating the basis for their appraisal and performance-based administrative actions).

<sup>292</sup> GAO Report on Overseas Bases, *supra* note 143, at 46.

charged by German prosecutors for negligent discharge of oil into a stream after U.S. authorities had determined no procedures were violated, and one employee eventually paid a "sum of atonement" before criminal charges were dropped.<sup>293</sup> Recognizing the jeopardy of host nation criminal prosecution in hazardous waste disposal, recent policies by some of the military services in Europe prohibit civilian employees from signing hazardous waste manifests and require U.S. military personnel to do so.<sup>294</sup>

Environmental violations by U.S. civilian employees are not the only kind of case that may potentially expose the relative leniency of administrative disposition by U.S. forces with host nation criminal prosecution, but these types of offenses are uniquely subject to host nation sensitivities not usually encountered. One need not speculate too long on the political reaction in a foreign nation to that nation's decision (honoring a traditional U.S. request for "waiver") not to prosecute a U.S. civilian employee responsible for a significant environmental incident, if a similarly situated citizen of that nation would have been subject to severe criminal enforcement. Additional evidence of disparate treatment of offenses by U.S. civilian employees overseas handled administratively may be found in cases of DOD federal employee prosecutions for environmental violations in the U.S., often resulting in significant fines, lengthy probation, and sometimes imprisonment.<sup>295</sup>

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<sup>293</sup> Motz Interview, *supra* note 194.

<sup>294</sup> Phelps Interview, *supra* note 159.

<sup>295</sup> Nangle, *supra* note 260, at 442-443. Cf. Statement of Breckenridge L. Willcox, United States Attorney, Baltimore, Maryland: "Federal employees are not above the law." ARMY TIMES, Mar. 6, 1989, at 10.

## B. Proposed Legislation for Extraterritorial Criminal Jurisdiction

The need to fill the jurisdictional void for civilians accompanying U.S. forces overseas has been recognized for quite some time. In its 1979 report, GAO concluded that extraterritorial jurisdiction was required to remedy the problem.<sup>296</sup> At that time, GAO identified two consequences of the necessary reliance on host nation prosecutions of U.S. civilians: (1) these civilians could be subject to foreign judicial systems that may not offer all the guarantees that criminal defendants in the U.S. enjoy, and (2) civilian offenders would escape judicial sanction for their crimes if host nations chose not to exercise criminal jurisdiction.<sup>297</sup> The GAO further opined that U.S. authorities' inability to dispose of such misconduct outside of administrative sanctions could cause serious discipline and morale problems in overseas communities.<sup>298</sup> The report further noted that the U.S. policy of maximizing its jurisdiction (which the GAO viewed as inadequate since it was limited to administrative sanctions) tended to aggravate the situation.<sup>299</sup>

Proposed legislation first introduced in 1967 and periodically reintroduced in some form has purported to address the jurisdictional problem over the civilian component, but has never been passed into law.<sup>300</sup>

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<sup>296</sup> GAO Report on Civilians, *supra* note 128, at 2.

<sup>297</sup> *Id.* at 6-8.

<sup>298</sup> *Id.* at 11-12.

<sup>299</sup> *Id.* at 6.

<sup>300</sup> S. 2007, 90th Cong., 1st Sess. (1967) (creating extraterritorial jurisdiction over civilians accompanying the forces overseas and subjecting them to some of the substantive provisions of the UCMJ); S. 1, 94th Cong., 1st Sess. (1975) (subjecting U.S. citizens



Legislation to address the jurisdictional problem has been proposed in the current Congress.

S. 74, The Jurisdiction, Apprehension, and Detention Act of 1995,<sup>301</sup> adding a chapter 50 to Title 10 U.S.C., provides that any person serving with, employed by or accompanying U.S. forces outside the U.S. who engages in conduct that would constitute a criminal offense if the conduct were engaged in within the special maritime and territorial jurisdiction<sup>302</sup> of the U.S. shall be guilty of a like offense.<sup>303</sup> S. 74 also authorizes apprehension by U.S. authorities for removal to the U.S. for judicial proceedings, or delivery of the offender to foreign country authorities for trial if requested and authorized by treaty.<sup>304</sup>

S. 3, The Federal Criminal Law Improvements Act of 1995,<sup>305</sup> adding a chapter 212 to title 10, U.S.C., provides for the same extraterritorial criminal liability as S. 74, but only for criminal offenses punishable by imprisonment of more than one year if the conduct were engaged in within the special maritime and territorial jurisdiction of the U.S.<sup>306</sup> S. 3 also

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overseas to the general jurisdiction of the U.S. if the crime fell within one of nine categories of major offenses such as treason or espionage); H.R. 255, 99th Cong., 1st Sess. (1985) (expanding the special maritime and territorial jurisdiction of the U.S. to cover U.S. citizens accompanying U.S. forces outside the U.S.). *See also* S. 1630, 97th Cong., 2d Sess. (1981) and H.R. 4531, 103d Cong., 2d Sess. (1994).

<sup>301</sup> S. 74, 104th Cong., 1st Sess. (1995). H.R. 808, 104th Cong., 1st Sess. (1995) provides for the identical provisions as S. 74.

<sup>302</sup> 18 U.S.C. § 7, *supra* note 129 defines such jurisdiction.

<sup>303</sup> S. 74 and H.R. 808, *supra* note 301, § 992(a).

<sup>304</sup> *Id.* § 993(a).

<sup>305</sup> S. 3, 104th Cong., 1st Sess. (1995).

<sup>306</sup> *Id.* § 3261(a).

provides for the same apprehension, removal and delivery procedures as S. 74.<sup>307</sup> Although the above bills if passed could potentially solve the U.S. forces' jurisdictional problem with respect to the civilian component committing some criminal offenses,<sup>308</sup> they do nothing to solve the jurisdictional void for environmental offenses. The statutes defining the scope of certain offenses committed within the special maritime and territorial jurisdiction of the U.S. are primarily limited to violent crimes such as murder, assault and robbery.<sup>309</sup> None of the crimes providing for the special maritime and territorial jurisdiction of the U.S. conceivably include conduct constituting an environmental offense. Thus, as to environmental crimes committed by civilians accompanying U.S. forces overseas, the jurisdictional void<sup>310</sup> would continue unless more specific legislation is introduced. There is scant reason for optimism of helpful legislation for this specific problem given the length of time the overall problem of jurisdiction over civilians overseas has lasted.

### C. A Need to Reevaluate the Policy of Maximizing Jurisdiction

As noted in Section II.C.1., *supra*, the genesis of the U.S. military's policy to

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<sup>307</sup> *Id.* § 3262(a).

<sup>308</sup> Such legislation is still subject to difficulties implementing such a scheme, such as coordinating with the host country the arrest and return of U.S. civilians, and the attempted extraterritorial reach being at odds with the provisions of SOFAs on allocation of jurisdiction to sending States only under military law. *See* McClelland, *supra* note 129, at 199-200.

<sup>309</sup> 18 U.S.C. §§ 1111, 213, 2111 (1994).

<sup>310</sup> False reporting of environmental activities and compliance by U.S. civilian employees could subject them to criminal liability under 18 U.S.C. §1001, as noted in Section III.A.4., *supra*. FGSs, containing specific recordkeeping requirements, could well provide the basis for such liability. *See, e.g.,* Italy FGS, Chapter 6, Appendix A, *infra* at 6-14 to 6-15.

maximize criminal jurisdiction at the time of the first SOFA's (NATO SOFA) ratification was the Senate's reservation about the quality of a host nation's criminal defendant's rights, such that the Senate Resolution really only required requests for waiver if "there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States."<sup>311</sup> Even the U.S. military's written policy implementing this Congressional will<sup>312</sup> reads consistently with the Senate Resolution despite its overbroad application. The real irony and illogicality of this policy *vis a vis* civilians is emphasized by the fact that U.S. military jurisdiction over civilians was found unconstitutional over 25 years ago because the court-martial procedure under the UCMJ did not afford adequate safeguards demanded by the U.S. Constitution as to the rights of grand jury indictment and trial by petty jury.<sup>313</sup>

Numerous safeguards to protect and assure the rights of U.S. forces overseas who are prosecuted by host nations are in place and constitute a significant duty for military commanders and legal advisors overseas.<sup>314</sup> Such safeguards include: the pressing of a waiver request through diplomatic channels if a substantial possibility exists that an accused will not receive a fair trial; the provision for U.S. trial observers at host nation proceedings; the provision of legal advisors for an accused; the payment of counsel fees and expenses in most cases and the payment of bail in all cases; and provisions for care and treatment of

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<sup>311</sup> Senate Resolution, *supra*, note 42.

<sup>312</sup> SOFA Tri-Service Regulation, *supra* note 40.

<sup>313</sup> G. DRAPER, *supra* note 25, at 120.

<sup>314</sup> *See, e.g.*, SOFA Tri-Service Regulation, *supra* note 40.

personnel confined in a host nation penal institution.<sup>315</sup>

A military member committing an environmental offense overseas at least presents the possibility of U.S. jurisdiction as envisioned by SOFAs under the UCMJ (although considerable work and analysis need to be done to credibly assert this jurisdiction). Unlike military members, civilians accompanying U.S. forces have no chance of being prosecuted under the UCMJ (and currently have almost no chance of being prosecuted under U.S. extraterritorial criminal statutes which would not mesh with SOFA obligations even if such statutes existed). DOD and U.S. military authorities would therefore be well advised to reconsider the current policy and encourage the exercise of host nation jurisdiction over serious environmental criminal offenses by U.S. civilians if they are satisfied that the accused will receive a fair trial in the host country.

Compelling justification exists for such a change in policy. First, the U.S. historically has little legal basis to seek to dispose of an offense itself unless an accused will not receive a fair trial by the host nation. Second, the U.S. is simply not adequately equipped with jurisdiction to handle serious cases (the suggestion to reevaluate the policy herein does not advocate wholesale turnover of civilian cases to host nation authorities), and a more reasoned policy avoids being asked the embarrassing questions of the basis of U.S. jurisdiction and why serious cases merit only administrative sanctions (there are no good answers to such questions, particularly in a politically charged case involving environmental noncompliance). Finally, "allowing" host nation prosecutions of more serious cases "levels

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<sup>315</sup> *Id.* Chapters 1, 2 and 3.

the playing field" between U.S. civilians overseas and their U.S. civilian employee and host nation citizen counterparts already subject to meaningful sanctions for environmental crimes (and in turn should promote compliance with a stronger deterrent effect).

## VII. Conclusion

The exercise of criminal jurisdiction by the U.S. over its forces abroad has evolved considerably in the history of those forces' deployments, particularly since the negotiation of SOFAs with host nations. Despite the attempt in SOFAs to balance equitably the exercise of sovereignty through criminal jurisdiction allocations between the U.S. and receiving States, the general policy and practice of the U.S. has nonetheless been to maximize waivers (or releases) of foreign criminal jurisdiction over U.S. forces in cases when host nations have primary concurrent or exclusive jurisdiction. Although this policy probably goes beyond the Congressional mandate of when to maximize U.S. jurisdiction, the policy has operated largely without host nation perception of infringement on sovereignty - so far. This policy has been defended on the additional ground of the need to ensure consistent military discipline among U.S. forces, and this justification makes sense as long as the U.S. has the capability and will to discipline its own forces.

A relative complacency by U.S. authorities in securing waivers of host nation jurisdiction has grown out of the maximization policy, to the point where many U.S. commanders do not appreciate the infringement on sovereignty that a waiver or release request could represent. In some host nations such as Germany, where the largest concentration of U.S. forces outside the U.S. exists, U.S. authorities have for all practical purposes reverted to the law of the flag. This practice not only conflicts with SOFA provisions but also contrasts with the phenomenon of emerging sovereignty among many host nations. The case of a reunited Germany and a renegotiated Supplementary Agreement presents a compelling general example of politics that are no longer solicitous of a protective

U.S. presence. Other nations hosting substantial numbers of U.S. forces are likewise more aware of the general intrusion on their sovereignty by concessions to U.S. forces in an era of perceived diminishing external threats to those nations' security.

Besides the emergence of sovereignty in general, host nations are less likely to be as solicitous as in the past of U.S. SOFA privileges (or more importantly, the practice of being more generous to U.S. interests than a SOFA requires) when a conflict exists with another treaty obligation or a nation's sense of values. A recent example of such a conflict proved to be the U.S. military authorities' right to adjudge a death penalty versus Dutch perceptions of its human rights' obligations.<sup>316</sup> The case illustrated a relatively small sovereign's ability to disregard a SOFA obligation (the U.S. primary right to exercise jurisdiction) and to cancel the U.S. exercise of criminal jurisdiction over its forces for as long as it was in the host nation's political interests to do so.<sup>317</sup>

With the overlay of SOFA criminal jurisdiction as background, environmental compliance has caught the world's attention just in the last decade. Environmental incidents occurring worldwide have spurred the growth of international environmental legislation and enforcement efforts targeted at noncompliance, to include criminal prosecution. Coincidentally, many industrialized nations leading the way also have some of the largest concentrations of U.S. forces overseas. U.S. forces' activities at overseas installations have not escaped the growing international focus on the environment, and U.S. authorities have

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<sup>316</sup> See *supra*, note 68 and accompanying text.

<sup>317</sup> *Id.*

struggled for years over what specific environmental laws and standards to apply to U.S. forces overseas. After episodes of noncompliance with U.S. and host nation law criticized at home and abroad, DOD has crafted a policy applying the stricter of host nation or U.S. substantive environmental law standards at its overseas installations. This policy has taken shape in the form of country-specific final governing standards which are in effect (except in Germany and Korea due in part to last minute funding skirmishes within DOD).

Unfortunately, most FGSs and the DOD guidance on which they are based disclaim setting any standards of individual responsibility for environmental compliance by U.S. forces. Perhaps unintentional, such exculpatory language could cripple U.S. efforts to enforce the FGS standards against its forces. The significance of this handicap becomes apparent when U.S. authorities' failures to enforce environmental compliance by its overseas forces runs head on into host nations becoming more pressured, willing, or anxious to prosecute environmental offenses themselves as an act of sovereignty in an age of heightened political sensitivity to the environment. For U.S. authorities to maintain their ability to maximize criminal jurisdiction over their forces committing environmental offenses, and indeed to maintain their ability to exercise criminal jurisdiction over forces committing environmental offenses arising out of the performance of official duty, these authorities must have the legal tools at their disposal to handle environmental offenses.

Final governing standards provide the basic foundation for U.S. military authorities to exercise criminal jurisdiction under the Uniform Code of Military Justice, but more work and attention to detail are needed to plug the gaps in military law *vis a vis* the handling of environmental offenses. A handful of past cases demonstrates an insidious inability of the



UCMJ to dispose of many environmental offenses potentially committed by U.S. forces, both related and unrelated to FGSs. The greater concern, however, because it is more difficult to remedy, is U.S. military authorities' apparent lack of will to enforce environmental compliance by using whatever criminal jurisdiction they have. Both the lack of UCMJ tools and the lack of will to use them are at odds with the U.S. policy of maximizing its criminal jurisdiction. The unappreciated danger becomes the significant erosion of U.S. authorities' ability to handle their own cases when environmental offenses are involved. International sensitivity and citizen pressure on host nations will present a formidable enough challenge to continued U.S. jurisdiction over these uniquely contentious cases - the U.S. will lose by default when the challenge comes in the absence of a criminal apparatus to deal with these offenses.

Environmental offenses committed by a distinct segment of U.S. forces, U.S. civilian employees, present a different problem for U.S. military authorities. Not possessing criminal jurisdiction over these civilian employees and armed only with administrative sanctions, U.S. military authorities have continued, under the umbrella of maximizing waivers, to seek host nation release of these cases. The U.S. Congress has failed for years to enact any legislation applying extraterritorially to crimes committed by civilians accompanying U.S. forces overseas, and currently proposed legislation in both Houses of Congress does not reach environmental offenses. For the sake of U.S. credibility, similar treatment of civilian offenders with their U.S. and host nation counterparts, and realistic deterrence of environmental noncompliance, U.S. authorities should reevaluate their broad policy of seeking releases in so many cases. Although a potential "slippery slope," in doing so the

U.S. would put itself in the position of intelligently attempting to screen appropriate cases for host nation prosecution (where host nation minimum procedural guarantees are met) where it serves U.S. as well as host nation interests of enforcement of environmental compliance.

DOD efforts to develop concrete standards in the FGSs are a significant improvement to U.S. forces' environmental compliance at overseas installations. Their usefulness and the legitimate U.S. interests in disciplining its own forces (particularly military members) both become diluted, however, by not linking FGS standards with enforcement mechanisms. Compounding these problems will be the inevitable questioning and occasional confrontation by host nation authorities as to the U.S. basis to prosecute its forces for environmental offenses and an intense interest in what action is in fact taken against an offender - the U.S. should prepare now to answer these questions. Military discipline and environmental compliance are not inconsistent goals, but it is high time for DOD and its components to match the rhetoric<sup>318</sup> about environmental compliance overseas with action (and the realistic ability to take action). At the same time, the U.S. will help preserve the SOFAs as a cornerstone of modern American strategic policy, while working to resolve critical environmental issues among signatories.

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<sup>318</sup> "This Administration wants the United States to be the world leader in addressing environmental problems and I want the Department of Defense to be the Federal leader in agency environmental compliance and protection." Richard Cheney, Secretary of Defense, Oct. 10, 1989, OEBGD, *supra* note 149, Introduction at 1-1.

## Appendix A

### CHAPTER 6 - HAZARDOUS WASTE - Italy

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#### SCOPE

This chapter contains standards for a comprehensive management program to ensure that hazardous waste is identified, stored, transported, treated, disposed and recycled in an environmentally-sound manner. This program provides a tracking system for management of hazardous waste from generation to ultimate disposal.

#### DEFINITIONS

**Acute Hazardous Waste** - those wastes listed in Appendix A, Table A.4 with a U.S. EPA waste number with the designator "P" or those wastes with (H) following the waste number.

**Concentration Limit (CL)** - a concentration value used in Italy to determine if a waste containing certain compounds falls in the category "toxic and noxious" (see Appendix C).

**Department of Defense Activity Account Code (DODAAC)** - a unique number used to identify a DOD activity for accounting purposes.

**Disposal** - the utilization of those methods of treatment and/or containment technologies, as are approved in section 6-11 herein, that effectively mitigate the hazards to human health or the environment of the discharge, deposit, injection, dumping, spilling, leaking, or placing of a hazardous waste into, or on any land or water in a manner that, without application of such methods, such hazardous wastes or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwater.

**DOD Hazardous Waste Generator** - in DOD, a generator is considered to be the installation or activity on an installation which produces a regulated hazardous waste.

**Hazardous Constituent** - a chemical compound that is listed by name in Appendix A or Appendix B, or possesses the characteristics described in Appendix A.

**Hazardous Waste (HW)** - a solid, semi-solid, or liquid material, or a contained gas that has been discarded or is no longer suitable for its intended purpose and that either exhibits a characteristic of a hazardous waste as described in Appendix A, Section A-2, or is listed as a hazardous waste in Table A.4, or that meets the criteria defining a toxic and noxious waste under the Italian system

as described in Appendix C.

**Hazardous Waste Accumulation Point (HWAP)** - an area at or near the point of generation where hazardous wastes are temporarily stored, up to 208 liters (55 gallons) of hazardous waste or liter (1 quart) of acute hazardous waste, from each waste stream, until removed to a Hazardous Waste Storage Area (HWSA) or shipped for treatment or disposal.

**Hazardous Waste Fuel** - hazardous wastes burned for energy recovery are termed "hazardous waste fuel." Fuel produced from hazardous waste by processing, blending or other treatment is also hazardous waste fuel.

**Hazardous Waste Generation** - any act or process that produces hazardous waste as defined in this document.

**Hazardous Waste Storage Area (HWSA)** - refers to a location on a DOD installation where more than 208 liters (55 gallons) of hazardous waste, or 1 liter (quart) of acute hazardous waste, from any one waste stream is stored prior to shipment for treatment or disposal.

**Hazardous Waste Storage Area Manager** - a person or agency on the installation assigned the operational responsibility for receiving, storing, inspecting, and general management of the installation's HWSA or HWSA program.

**Hazardous Waste Profile Sheet (HWPS)** - a document which identifies and characterizes the waste by providing user's knowledge of the waste, and/or lab analysis, and details the physical, chemical, and other descriptive properties or processes which created the hazardous waste.

**Incompatible wastes** - wastes that can react together dangerously, giving rise to the formation of notable quantities of heat, explosive, flammable and/or toxic products.

**Land Disposal** - placement in or on the land including, but not limited to, land treatment facilities, surface impoundments, underground injection wells, salt dome formations, salt bed formations, underground mines or caves.

**Mobile Container** - a container which is designed for transport, not including tank trucks, and which is not installed for stationary use at a permanent location.

**Special Waste** - Wastes derived from the following sources (see Appendix C).

- a. industrial processing, agricultural, and commercial activities;
- b. hospitals, nursing homes and similar activities (see Chapter 8);
- c. construction, demolition and excavation material, machinery, and discarded or

obsolete equipment;

- d. scrap motor vehicles, trailers and parts thereof;
- e. residual materials including sludge from waste and wastewater treatment facilities.

**Toxic and Noxious Waste** - A component of special wastes defined as containing, or being suspected to contain, certain toxic or noxious substances in quantities greater than a defined concentration limit (see Appendix C).

**Treatment** - any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

**Treatment, Storage, and Disposal Facility (TSDF)** - refers to any facility not located on a DOD installation that is used for the collection, source separation, storage, transportation, transfer, processing, treatment, or disposal of hazardous waste.

**Type II landfill** - An Italian sanitary landfill categorized for the disposal of various special and toxic and noxious wastes. Type II landfills are subcategorized as Types IIA, IIB, and IIC (see Appendix C).

**Type III landfill** - An Italian sanitary landfill categorized for the disposal of toxic and noxious wastes for which no other technical disposal alternative exists (see Appendix C).

**Used oil burned for energy recovery** - used oil that is burned for energy recovery is termed "used oil fuel." Used oil fuel includes any fuel produced from used oil by processing, blending or other treatment. "Used oil" means any oil or other waste POL product that has been refined from crude oil, or is a synthetic oil, has been used, and as a result of such use, is contaminated by physical or chemical impurities. Used oil exhibiting the characteristics of reactivity, ignitability, and corrosivity is still considered used oil, unless it has been mixed with other hazardous waste. However, used oil that exhibits the characteristic of toxicity as described in Appendix A is a hazardous waste and will be managed as such. In addition, used oil mixed with hazardous waste is a hazardous waste and will be managed as such. Used oils must have a PCB content less than 25 ppm to be burned for energy recovery.

## **STANDARDS**

### **6-1. DOD Hazardous Waste Generators.**

A. **Hazardous Waste Determination.** Generators will identify and characterize the wastes generated at their site using their knowledge of the materials and processes which generated the waste or through laboratory analysis of the waste. A Hazardous Waste Profile Sheet (HWPS) or its Italian equivalent will be used to identify each hazardous waste stream.

B. **Waste Characterization.** Generators will identify inherent hazardous characteristics associated with a waste in terms of physical properties (e.g. solid, liquid, contained gases), chemical properties (e.g. chemical constituents, technical or chemical names) and/or other descriptive properties (e.g. ignitable, corrosive, reactive, toxic). The properties defining the characteristics will be measurable by standardized and available testing protocols.

1. Wastes generated by DOD operations which are collected, stored or handled on DOD installations will be characterized using the definitions contained in Appendix C, together with the characteristics described in Appendix A, Section A-2.
2. Wastes which are prepared for transport to and disposal in a facility in Italy will be characterized in accordance with section 6-1.B.1.
3. Wastes which are prepared for retrograde to the United States for disposal, in accordance with section 6-11.B.1, will be characterized in accordance with Appendix A and current U.S. law.

C. **Unit Identification Number.** Each generator will use its DODAAC number for all recordkeeping, reports and manifests for hazardous waste.

**D. Pre-Transport Requirements:**

1. Hazardous Waste generators will prepare off-installation hazardous waste shipments in compliance with ADR as referenced in Chapter 5. DOD organizations will comply with these standards when transporting hazardous waste, via military vehicle or commercial transportation, on Italian public roads and highways. Standards include, among others, placarding, marking, containerization, and labeling. Installations transporting their hazardous wastes by contract will ensure that the contracted firm possesses the required Italian permits.
2. All hazardous waste leaving the installation will be accompanied by a manifest to ensure a complete audit trail from point of origin to ultimate disposal which will include the information listed below. Italian forms will be used when practical; otherwise, DD Form 1348-1 may be used. Forms prepared by DOD personnel will be prepared bilingually in English and Italian. Forms prepared by a commercial firm under contract to the DOD need be prepared in Italian only. The manifest must include:
  - a. Generator's name, address, DODAAC number, and telephone number;
  - b. Transporter's name, address, and telephone number;
  - c. Destination name, address, and telephone number;
  - d. Description of waste;
  - e. Total quantity of waste;
  - f. Date of shipment; and
  - g. Date of receipt.
3. Generators will maintain an audit trail of hazardous waste from the point of generation to disposal. Generators using DRMS disposal services will obtain a signed copy of the manifest from the initial DRMS recipient of the waste, at which time DRMS assumes responsibility. Generators will maintain waste disposal records for a period of five years, and will provide data for disposal planning purposes to the appropriate Italian authorities upon request.



4. A generator, as provided in a host-tenant agreement, that uses the hazardous waste management and/or disposal program of a DOD component that has a different DODAAC number, will obtain a signed copy of the manifest from the receiving component, at which time the receiving component will assume responsibility for subsequent storage, transfer and disposal of the waste. Activities desiring to dispose of their waste outside of the DRMS system in accordance with section 6-11, will develop their own manifest tracking system to provide an audit trail from point of generation to ultimate disposal.

## **6-2. Hazardous Waste Accumulation Points (HWAP).**

A. **Location Standards.** A HWAP may be a shop, site, or other work center dealing with one or more waste streams. Each HWAP must be designed and operated to provide appropriate segregation for different waste streams, including those which are chemically incompatible. Each HWAP will have warning signs appropriate for the waste being accumulated at that site.

B. **Storage Limits.** A hazardous waste accumulation point may temporarily store up to 208 liters (55 gallons) of hazardous waste or 1 liter (quart) of acute hazardous waste, from each waste stream. When these limits have been reached, the generator will make arrangements to move the hazardous waste to a HWSA or ship it off-site for treatment or disposal.

C. **Containment.** The provisions of section 6-4.A, C, and D will be applied to all HWAPs. In addition, container storage areas must have a containment system, e.g., drip pans, that has sufficient capacity to contain 10% of the volume of all containers or the volume of the largest container, whichever is greater. Containers that do not contain free liquids need not be considered in this determination.

## **6-3. Hazardous Waste Storage Areas (HWSA).**

A. **Location Standards.** To the maximum extent possible, a new HWSA will be located to minimize the risk of release due to seismic activity, floods, or other natural events. For facilities located where they may face such risks, the installation spill prevention and control plan must address the risk. New HWSAs will be located in coordination with the appropriate Italian authority.

B. **Design and operation of HWSA.** HWSAs must be designed, constructed, maintained, and operated to minimize the possibility of a fire, explosion, or any unplanned release of hazardous waste or hazardous waste constituents to air, soil, or surface water

that could threaten human health or the environment.

**C. Waste Analysis**

1. The installation, in conjunction with the HWSA manager, will develop a plan to determine how and when wastes are to be analyzed. The waste analysis plan will include procedures for characterization and verification testing of both on-site and off-site hazardous waste. The plan will include: parameters for testing and rationale for choosing them, frequency of analysis, test methods, and sampling methods.
2. The installation must have, and keep on file, a hazardous waste profile sheet (HWPS) for each waste stream handled by each HWSA. No waste may be accepted for storage unless such information has been provided. The HWPS must be updated by the generator as necessary to reflect any new waste streams or process modifications that change the character of the hazardous waste being handled at the storage area. The HWSA manager will conduct periodic verification testing of the hazardous wastes in storage to ensure that the hazardous wastes being stored are accurately identified by the generator.
3. Generating activities will provide identification of incoming waste (HWPS) to the HWSA manager. Prior to accepting the waste, the HWSA manager will:
  - a. Inspect the waste to ensure it matches the description provided;
  - b. Request a new HWPS from the generator if there is reason to believe that the process generating the waste has changed;
  - c. Analyze waste shipments in accordance with the waste analysis plan to determine whether it matches the waste description on the accompanying manifest and documents; and
  - d. Reject shipments which do not match the accompanying waste descriptions unless the generator provides an accurate description.

**D. Security**

1. The installation must prevent the unknowing entry, and minimize the possibility for unauthorized entry, of persons or livestock onto the

hazardous waste storage area grounds.

2. An acceptable security system for a hazardous waste storage area consists of either:
  - a. A 24-hour surveillance system (e.g. television monitoring or surveillance by guards or other designated personnel) that continuously monitors and controls entry into the hazardous waste storage area; or
  - b. An artificial or natural barrier (e.g. a fence in good repair or a fence combined with a cliff) that completely surrounds the hazardous waste storage area, combined with a means to control entrance at all times (e.g. an attendant, television monitors, locked gate, or controlled roadway access).
3. A sign with the legend "Danger Unauthorized Personnel Keep Out - Pericolo, Ingresso Vietato al Personale Non Autorizzato" must be posted at each entrance to the hazardous waste storage area, and at other locations, in sufficient numbers to be seen from any approach to the hazardous waste storage area. The sign must be legible from a distance of at least 8 m (25 feet). Existing signs with a legend other than "Danger Unauthorized Personnel Keep Out - Pericolo, Ingresso Vietato al Personale Non Autorizzato" may be used if the legend on the sign is prepared bilingually and indicates that only authorized personnel are allowed to enter the hazardous waste storage area, and entry to it can be dangerous.

**E. Required Aisle Space.** Aisle space must allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency. Containers must not obstruct an exit.

**F. Access to communications or alarm system**

1. Whenever hazardous waste is being poured, mixed, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another person.
2. If there is only one person on duty at the HWSA premises, that person must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance.

**G. Required equipment.** All HWSAs must be equipped with the following:

1. An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to HWSA personnel;
2. A device, such as an intrinsically safe telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from base security, fire departments, or emergency response teams;
3. Portable fire extinguishers, fire control equipment appropriate to the material in storage (including special extinguishing equipment as needed, such as that using foam, inert gas, or dry chemicals), spill control equipment, and decontamination equipment;
4. Water at adequate volume and pressure to supply water hose streams, foam producing equipment, automatic sprinklers, or water spray systems;
5. Readily available personal protective equipment appropriate to the materials stored, eyewash and shower facilities;
6. All HWSA communications alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be periodically tested and maintained to assure its proper operation in time of emergency.

**H. General Inspection Requirements.**

1. The installation must inspect the HWSA for malfunctions and deterioration, operator errors, and discharges that may be causing, or may lead to, a release of hazardous waste constituents to the environment or threat to human health. The inspections must be conducted often enough to identify problems in time to correct them before they harm human health or the environment.
2. Inspections must include all equipment and areas involved in storage and handling of hazardous waste, including all containers and container storage areas, tank systems and associated piping, and all monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or responding to environmental or human health

hazards.

3. Inspections must be conducted according to a written schedule that is kept at the HWSA. The schedule must identify the types of problems (e.g. malfunctions or deterioration) that are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).
4. Minimum frequencies for inspecting containers and container storage areas are found in section 6-4.A.6 of this chapter; minimum frequencies for inspecting tank systems are found in section 6-8.E.2 of this chapter. For equipment not covered by those sections, inspection frequency will be based on the rate of possible deterioration of the equipment and probability of an environmental or human health incident if the deterioration or malfunction or any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use.
5. The installation must remedy any deterioration or malfunction of equipment or structures that the inspection reveals on a schedule which ensures that the problem does not lead to an environmental or human health hazard. Where a hazard is imminent or has already occurred, action must be taken immediately.
6. The installation must record inspections in an inspection log or summary, and keep these records for at least five years from the date of inspection. At a minimum, these records must include the date and time of inspection, the name of the inspector, a notation of the observations made, and the date and nature of any repairs or other remedial actions.

I. **Personnel Training.** Personnel assigned HWSA duty must successfully complete an appropriate hazardous waste training program in accordance with the training requirements in section 6-10 of this chapter.

J. **Storage Practices.**

1. The storage of ignitable, reactive, or incompatible wastes must be handled so that it does not threaten human health or the environment. Dangers resulting from improper storage of incompatible wastes include generation of extreme heat, fire, explosion and generation of toxic gases.

2. The HWSA manager must take precautions to prevent accidental ignition or reaction of ignitable or reactive waste. This waste must be separated and protected from sources of ignition or reaction including but not limited to: open flames, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical, or mechanical), spontaneous ignition (e.g., from heat-producing chemical reactions), and radiant heat.
  - a. While ignitable or reactive waste is being handled, the HWSA personnel must confine smoking and open flame to specially designated locations.
  - b. "No smoking - Vietato Fumare" signs must be conspicuously placed wherever there is a hazard from ignitable or reactive waste.
  - c. Water reactive waste cannot be stored in the same area as flammable and combustible liquid.

#### **6-4. Use and Management of Containers.**

**A. Container Handling and Storage.** To protect human health and the environment, the following standards will apply when handling and storing hazardous waste containers at HWSAs.

1. Containers holding hazardous waste will be in good condition, free from severe rusting, bulging or structural defects.
2. Containers used to store hazardous waste, including overpack containers, must be compatible with the materials stored.
3. Mobile containers must be equipped with proper means of closure and with features to allow safe loading, unloading, and easy movement.
4. Management of containers.
  - a. A container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.
  - b. A container holding hazardous waste must not be opened, handled, or stored in a manner which may rupture the container or cause it to leak.

- c. Hazardous waste containers will be properly decontaminated prior to reuse.
  - d. Food will not be stored in hazardous waste containers.
5. Containers holding hazardous waste will be marked with a hazardous waste marking, and a label indicating the hazard class of the waste contained (i.e., flammable, corrosive, etc.), written in both English and Italian. Additionally, a permanent label or stamp will be placed on each container to identify the material as a hazardous waste. Where feasible, the label will be yellow, 15 cm x 15 cm, with a black "R". The "R" must be 10 cm high, 8 cm wide, and set in 1.5 cm thick type.
6. Areas where containers are stored must be inspected weekly for leaking containers and for deterioration of containers and the containment system caused by corrosion or other factors. Secondary containment systems will be inspected for defects and emptied of accumulated releases.

**B. Containment.** Container storage areas must have a containment system meeting the following requirements:

- 1. Must be sufficiently impervious to contain leaks, spills and accumulated precipitation until the collected material is detected and removed;
- 2. The containment system must have sufficient capacity to contain 10% of the volume of stored containers or the volume of the largest container, whichever is greater.
- 3. Storage areas that store containers holding only wastes that do not contain free liquids need not have a containment system as described in Paragraph B-1. above, provided the storage area is sloped or is otherwise designed and operated to drain and remove liquid resulting from precipitation, or the containers are elevated or are otherwise protected from contact with accumulated liquid.

**C. Special Requirements for Ignitable or Reactive Waste.** Areas which store containers holding ignitable or reactive waste must be located at least 15 meters (50 feet) inside the installation's boundary.



**D. Special Requirements for Incompatible Wastes.**

1. Hazardous wastes and materials which can react with each other to cause extreme heat, explosions, fire or toxic products must not be placed in the same container.
2. Hazardous waste must not be placed in an unwashed container that previously held an incompatible waste or material.
3. A storage container holding a hazardous waste that is incompatible with any waste or other materials stored nearby in other containers, piles, open tanks, or surface impoundments must be separated from the other materials or protected from them by means of a dike, berm, wall, or other device.

**6-5. Recordkeeping Requirements.**

**A. Hazardous Waste Log. (HWSA, HWAP)** A written log will be maintained to record all hazardous waste handled and will consist of the following:

1. Name, address, and DODAAC number of generator;
2. Description and hazard class of the hazardous waste;
3. Number and types of containers;
4. Quantity of hazardous waste;
5. Date stored;
6. Storage location; and
7. Disposition data, to include: dates received, sealed and transported and transporter used.

**B. Availability.** The Hazardous Waste Log will be available to emergency personnel in the event of a fire or spill. Logs will be maintained until closure of the installation.

**C. Inspection Logs. (HWSA, HWAP)** Records of inspections will be maintained for a period of five years.

**D. Manifests. (HWSA, HWAP)** Manifests of incoming and outgoing hazardous wastes will be retained for a period of five years.

E. **Waste Analysis/ Characterization Records** (HWSA, HWAP) will be retained until five years after closure.

F. **Closure plan.** Closure plans will be developed before a new HWSA is opened. Each existing HWSA also will develop a closure plan. Concurrent with the decision to close the HWSA the plan will be implemented. The closure plan will include: estimates of the storage capacity of hazardous waste, steps to be taken to remove or decontaminate all waste residues, and estimate of the expected date for closure. See also section 6-7 of this chapter.

#### **6-6. Contingency Plan.**

A. **Location.** Each installation will have a contingency plan to manage spills and releases of hazardous waste in accordance with the provisions of Chapter 18. A current copy of the installation contingency plan must be:

1. Maintained at the HWSA and each HWAP, and;
2. Submitted to all police departments, fire departments, hospitals, and emergency response teams identified in the plan, and which the plan relies upon to provide emergency services.

B. **Bilingual.** Plans will be available in both English and Italian.

**6-7. Closure (Only applies to HWSAs).** At closure of a HWSA, all hazardous waste and hazardous waste residues must be removed from the containment system including remaining containers, liners, and bases. Closure will be done in a manner which eliminates or minimizes the need for future maintenance or the potential for future releases of hazardous waste and in accordance with the Closure Plan.

**6-8. Tank Systems.** The following standards apply to all storage tanks containing hazardous wastes. See Chapter 19 for standards dealing with underground storage tanks containing petroleum, oil and lubricants and hazardous substances.

A. **Application.** The requirements of this part apply to HWSAs that use tank systems for storing or treating hazardous waste. Tank systems that are used to store or treat hazardous waste which contains no free liquids and are situated inside a building with an impermeable floor are exempted from the requirements in section 6-8.D below titled "Containment and Detection of Releases." Tank systems, including sumps, that serve as part of a secondary containment system to collect or contain releases of hazardous wastes, are exempted from the requirements in section 6-8.D below.

**B. Assessment of Existing Tank System's Integrity.** For each existing tank system that does not have secondary containment meeting the requirements of section 6-8.D installations must determine annually whether the tank system is leaking or is fit for use. Installations must obtain, and keep on file at the HWSA, a written assessment of tank system integrity reviewed and certified by a competent authority.

**C. Design and Installation of New Tank Systems or Components.** Managers of HWSAs installing new tank systems or components must obtain a written assessment, reviewed and certified by a competent authority attesting that the tank system has sufficient structural integrity and is acceptable for the storing and treating of hazardous waste. The assessment must show that the foundation, structural support, seams, connections, and pressure controls (if applicable) are adequately designed and that the tank system has sufficient structural strength, compatibility with the waste(s) to be stored or treated, and corrosion protection to ensure that it will not collapse, rupture, or fail.

**D. Containment and Detection of Releases.** In order to prevent the release of hazardous waste or hazardous constituents to the environment, secondary containment that meets the requirements of this section must be:

1. Provided for all new tank systems or components, prior to their being put into service;
2. Provided for those existing tank systems when the tank system annual leak test detects leakage;
3. Provided for tank systems that store or treat hazardous wastes by 1 January 1999;
4. Designed, installed, and operated to prevent any migration of wastes or accumulated liquid out of the system to the soil, groundwater, or surface water at any time during the use of the tank system; and capable of detecting and collecting releases and accumulated liquid until the collected material is removed; and
5. Constructed to include one or more of the following: a liner external to the tank, a vault, or a double-walled tank.
6. Constructed for multiple tanks to contain one third of the total volume of all tanks present or the total volume of the largest tank, whichever is greater.

**E. General Operating Requirements.**

1. Hazardous wastes or treatment reagents must not be placed in a tank system if they could cause the tank, its ancillary equipment, or the containment system to rupture, leak, corrode, or otherwise fail.
2. The installation must inspect and log at least once each operating day:
  - a. The above-ground portions of the tank system, if any, to detect corrosion or releases of waste;
  - b. Data gathered from monitoring and leak detection equipment (e.g., pressure or temperature gauges, monitoring wells) to ensure that the tank system is being operated according to its design; and
  - c. The construction materials and the area immediately surrounding the externally accessible portion of the tank system, including the secondary containment system (e.g., dikes) to detect erosion or signs of releases of hazardous waste (e.g., wet spots, dead vegetation).
3. The installation must inspect cathodic protection systems to ensure that they are functioning properly. The proper operation of the cathodic protection system must be confirmed within six months after initial installation and annually thereafter. All sources of impressed current must be inspected and/or tested, as appropriate, or at least every other month. The installation manager must document the inspections in the operating record of the HWSA.

**F. Response to Leaks or Spills and Disposition of Leaking or Unfit-For-Use Tank Systems.** A tank system or secondary containment system from which there has been a leak or spill, or which is unfit for use, must be removed from service immediately and repaired or closed. Installations must satisfy the following requirements:

1. The installation must immediately stop the flow of hazardous waste into the tank system or secondary containment system and inspect the system to determine the cause of the release.
2. The Installation must immediately conduct an inspection of the release and, based upon that inspection:



- a. Prevent further migration of the leak or spill to soils or surface water; and
  - b. Remove and properly dispose of any contamination of the soil or surface water.
3. Make required notifications and reports.

G. **Closure.** At closure of a tank system, the installation must remove or decontaminate all hazardous waste residues, contaminated containment system components (liners, etc.), contaminated soils to the extent practicable, and structures and equipment.

#### **6-9. Standards For The Management Of Used Oil And Lead-Acid Batteries.**

A. **Segregation.** Installations generating used oils will implement practices to ensure that used oils are collected separately from other hazardous substances and to avoid the formation of oil/water emulsions. Used oils containing PCBs will not be mixed with any other used oils. At regular intervals the used oil will be removed from the HWAP for recycling or final disposal, or stored at a HWSA in above ground storage tanks.

B. **Used Oil Burned for Energy Recovery.** Used oil may only be burned in authorized furnaces or boilers with a thermal capacity of at least 6 MW. Used oils burned for energy recovery must have a PCB content of less than 25 ppm. Facilities used for the combustion of used oil must meet the applicable air quality standards contained in Chapter 2. Combustion of used oil for energy recovery will be coordinated with the appropriate Italian authority. Used oil fuel may only be burned in the following types of facilities:

1. Industrial furnaces;
2. Boilers that are identified as follows:
  - a. Industrial boilers located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes;
  - b. Utility boilers used to produce electric power, steam or heated or cooled air or other gases or fluids.

C. **Use of Italian Used Oil Consortium.** Installations that do not possess a plant suitable for the combustion of used oils as defined in section 6-9.B above will give their used oils to the Italian consortium for recycling or final disposal, provided the oils contain less than 25 ppm of PCBs.

D. **PCB Oils.** Used oils containing greater than 25 ppm of PCBs must be handled in accordance with the requirements of Chapter 14 and disposed of as hazardous waste in authorized disposal facilities.

E. **Prohibitions on Dust Suppression or Road Treatment.** Used oil, hazardous waste, or used oil contaminated with any hazardous waste will not be used for dust suppression or road treatment.

F. **Lead-acid Batteries.**

1. Lead-acid Batteries that are to be recycled will be managed as hazardous material.
2. Lead-acid batteries which have exhausted their life cycle will be given together with other lead wastes to the Italian Consortium for the Collection and Recycling of Used Lead-acid Batteries or its authorized agent. General conditions of delivery will follow the requirements set forth by the consortium.

#### **6-10. Hazardous Waste Training.**

A. **Application.** Hazardous waste training is required for all DOD personnel (to include U.S. military, civilian and Italian personnel) whose duties involve actual or potential exposure to hazardous waste, including persons performing any of the following tasks:

1. Determining which wastes are hazardous wastes; or
2. Completing hazardous waste recordkeeping requirements, (e.g., manifests, hazardous waste logs, waste analysis plans, etc.); or
3. Handling/storage of hazardous waste containers; or
4. Transferring hazardous waste to or from accumulation tanks or containers; or

5. Transporting hazardous waste; or
6. Performing hazardous waste clean-up (non-emergency); or
7. Inspecting, managing or working at a HWAP or HWSA; or
8. Collecting hazardous waste samples; or
9. Conducting other hazardous waste related activities as designated by Base Commanders and/or Environmental Coordinators.

**B. Training Duration and Deadlines.** Personnel assigned to duties involving actual or potential exposure to hazardous waste must successfully complete an appropriate training program prior to assuming those duties. Personnel assigned to such duty after the effective date of this guidance document must work under direct supervision until they have completed appropriate training. Additional guidance is contained in DODI 6050.5, DOD Hazard Communication Program.

**C. Refresher Training.** All personnel performing duties as described above must successfully complete annual refresher hazardous waste training.

**D. Training Contents and Requirements.** The training program must:

1. Include sufficient information to enable personnel to fully comply with and carry out requirements set out in this document.
2. Be conducted by qualified trainers who have completed an instructor training program in the subject, or who have comparable academic credentials and experience.
3. Be designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment, and emergency systems.
4. Address the following areas in particular for personnel whose duties include hazardous waste handling and management:
  - a. Emergency procedures (response to fire/explosion/spills; use of communications/alarm systems; body and equipment clean up);
  - b. Drum/container handling/storage; safe use of HW equipment;



- c. Employee protection - Personal Protective Equipment (PPE), safety and health hazards, hazard communication, worker exposure; and
- d. Generator and HWSA operator - recordkeeping, security, inspections, contingency plans, storage requirements, transportation requirements.

E. **Documentation of Training.** Installations must document all hazardous waste training for each individual assigned duties involving actual or potential exposure to hazardous waste. Updated training records on personnel assigned duties involving actual or potential exposure to hazardous waste must be kept by the HWSA manager or the responsible installation office and retained for at least five years after termination of duty of these personnel.

#### **6-11. Hazardous Waste Disposal.**

A. **Disposal Through DRMS.** All DOD hazardous waste will normally be disposed of through the Defense Reutilization and Marketing Service (DRMS). A decision not to use the DRMS for hazardous waste disposal may be made in accordance with DODD 4001.1 for best accomplishment of the installation mission, but will be concurred in by the component chain of command and the Executive Agent to ensure that installation contracts and disposal criteria are at least as protective as criteria used by DRMS.

B. **Disposal Locations.** DOD components must ensure that wastes generated by DOD operations and considered hazardous are not disposed of in Italy unless the disposal is conducted in accordance with section 6-11.C.

1. When hazardous wastes cannot be disposed of in Italy in accordance with this document, it will be either retrograded to the U.S. or, if permissible under international agreements, transferred to another country outside the U.S. where it can be disposed of in an environmentally-sound manner and in compliance with the final governing standards applicable to the country of disposal, if any exist. Transshipment of hazardous wastes to another country other than the U.S. for disposal must be approved by, at a minimum, the DOD.
2. The determination of whether particular DOD-generated hazardous waste may be disposed of in Italy will be made by the DOD Executive Agent, in coordination with the Director of Defense Logistics Agency (DLA), or other relevant DOD Components, and the Chief of the U.S. Diplomatic Mission.



**C. Disposal of Hazardous Waste.**

1. The determination of whether hazardous wastes may be disposed of in Italy must include consideration of whether the means of treatment and/or containment technologies employed in the Italian program, as enacted and enforced, effectively mitigate the hazards of such waste to human health and the environment and must consider whether the Italian program includes:
  - a. An effective system for tracking the movement of hazardous waste to its ultimate destination.
  - b. An effective system for granting authorization or permission to those engaged in the collection, transportation, storage, treatment, and disposal of HW.
  - c. Appropriate standards and limitations on the methods which may be used to treat and dispose of HW.
  - d. Standards designed to minimize the possibility of fire, explosion, or any unplanned release or migration of HW or its constituents to air, soil, surface, or groundwater.
2. The Executive Agent must also be satisfied, either through reliance on the Italian regulatory system and/or provisions in the disposal contracts, that:
  - a. All persons and facilities in the waste management process have demonstrated the appropriate level of training and reliability; and
  - b. Effective inspections, monitoring, and record keeping will take place.

**D. Discarded Hazardous Material.** Hazardous material which meets the definition of hazardous waste, as defined in this chapter, and is discarded, either by the generating installation because it is no longer a useful product, or by the DRMS because the hazardous material has failed the reutilization, transfer or sales cycles, will be disposed of as a hazardous waste.

E. **Italian Facilities.** Facilities in Italy that either store, treat, or dispose of DOD-generated waste (TSDF) must be evaluated and approved by the appropriate Italian authorities as being in compliance with their regulatory requirements. This evaluation and approval may consist of having a valid permit or Italian equivalent for the hazardous waste which will be handled.

F. **Recycling.** Hazardous waste will be recycled or reused to the maximum extent practical. Safe and environmentally acceptable methods will be used to identify, store, prevent leakage, and dispose of hazardous waste, to minimize risks to health and the environment.

G. **Land disposal requirements.** Hazardous wastes will only be land disposed when there is a reasonable degree of certainty that there will be no migration of hazardous constituents from the disposal site for as long as the wastes remain hazardous. Hazardous waste may be land disposed in Italy only in permitted Type IIB, IIC, or III landfills, (see Appendix C). At a minimum, these landfills must meet the following standards:

1. The land disposal facility has a groundwater monitoring program capable of determining the facility's impact on the quality of water in the aquifers underlying the facility.
2. The requirements of section 6-11.G.1 may be waived for a particular land disposal facility by the Executive Agent if a written determination is made by a qualified geologist or geotechnical engineer that there is a low potential for migration of hazardous waste, hazardous constituents, or leachate from the facility to water supply wells, irrigation wells, or surface water. This determination will be based on an analysis of local precipitation, geologic conditions, physical properties, depth to groundwater, and proximity of water supply wells or surface water, as well as use of alternative design and operating practices, including methods for preventing migration such as liners and leachate collection systems.

H. **Incinerator Standards.** This section applies to all DOD owned and operated incinerators that burn more than 50 tons per day of hazardous waste as well as boilers and industrial furnaces that burn hazardous waste for any recycling purposes.

1. Incinerators used to dispose of hazardous waste must be licensed or permitted by a competent Italian authority or approved by the Executive Agent. This license, permit, or approval must comply with the standards listed in section 6-11.H.2.



2. A license, permit, or Executive Agent approval for incineration of hazardous waste must require the incinerator to be designed to include appropriate equipment as well as to be operated according to management practices (including proper combustion temperature, waste feed rate, combustion gas velocity, and other relevant criteria) so as to effectively destroy hazardous constituents and control harmful emissions. A permitting, licensing, or approval scheme must require incinerators used for the disposal of wastes to be equipped with a post combustion chamber (secondary combustion chamber) that complies with the following minimum operating standards:

- a. Municipal, special, and toxic and noxious wastes different from those listed in point b below::

O <sub>2</sub> content in wet flue gas ( at chamber outlet)	6% volume
Residency time	2 s
Post combustion chamber operating temperature	≥ 1,050pC

- b. Toxic and noxious wastes with organic chlorine compounds with a chlorine concentration > 2%:

O <sub>2</sub> content in wet flue gas (at chamber outlet)	6% volume
Residency time	2 s
Post combustion chamber operating temperature	≥ 1,200pC

- c. All incineration facilities must continuously measure and record the temperature and oxygen concentration of the post combustion chamber. The facilities used for the incineration of special and toxic and noxious wastes must be equipped with an automatic shut-off system to interrupt the feeding of the waste if the operating temperature drops more than 50 pC below the minimal operating value set during the permitting or approval process.
- d. Periodically, depending on the characteristics of the facilities and in particular the risks associated with the composition of the waste to be treated, the gas emissions and the ashes must be analyzed to determine the presence of organic chlorine micro-pollutants (dioxins and similar compounds).

- e. A permitting, licensing, or approval scheme which would require an incinerator to achieve the standards set forth in either subparagraph (1) or (2) below is acceptable.
  - (1) The incinerator achieves a destruction and removal efficiency of 99.99% for the organic hazardous constituents which represent the greatest degree of difficulty of incineration in each waste or mixture of waste. The incinerator must minimize carbon monoxide in stack exhaust gas, minimize emission of particulate matter and emit no more than 1.8 Kg (4 pounds) of hydrogen chloride per hour; or
  - (2) The incinerator has demonstrated, as a condition for obtaining a license, permit, or Executive Agent approval, the ability to effectively destroy the organic hazardous constituents which represent the greatest degree of difficulty of incineration in each waste or mixture of waste to be burned. For example, this standard may be met by requiring the incinerator to conduct trial burn, submit a waste feed analysis and detail engineering description of the facility, and provide any other information that may be required to enable the competent Italian authority or the Executive Agent to conclude that the incinerator will effectively destroy the principal organic hazardous constituents of each waste to be burned.
- f. All DOD owned or operated incinerators, boilers and industrial furnaces that burn more than 50 tons of hazardous waste per day must meet the air quality standards contained in Chapter 2.
- g. Specific requirements for incineration of PCB-containing wastes are set forth in Chapter 14.

**I. Treatment technologies.** The following treatment technologies may be used to reduce the volume or hazardous characteristics of wastes. Wastes which are categorized as hazardous on the basis of Section A.2 of Appendix A or on the basis of Appendix C and which, after treatment as described herein no longer exhibit any hazardous characteristic, may be disposed of as solid waste. The combustion of used oils for energy recovery will comply with requirements of section 6-9.B. Treatment residues of wastes categorized as hazardous under any other section of Appendix A or Appendix C will

continue to be managed as hazardous wastes under the standards of this document, including those for disposal. The treatment technologies for the following categories of hazardous wastes are:

1. Organics:

- a. Incineration in accordance with the requirements of section 6-11.H.
- b. Fuel substitution where the units are operated such that destruction of hazardous constituents are at least as efficient, and hazardous emissions are no greater than those produced by incineration.
- c. Wastes are degraded by microbial action. Such units will be operated under aerobic or anaerobic conditions so that the concentrations of a representative compound or indicator parameter (e.g., total organic carbon) has been substantially reduced in concentration. The level to which biodegradation must occur and the process time vary depending on the hazardous waste being biodegraded.
- d. Wastes are treated to recover organic compounds. This will be done using, but not limited to, one or more of the following technologies: distillation; thin film evaporation; steam stripping; carbon adsorption; critical fluid extraction; liquid extraction; precipitation/crystallization or chemical phase separation techniques, such as decantation, filtration and centrifugation when used in conjunction with one of the above techniques.
- e. The wastes are chemically degraded in such a manner so as to destroy hazardous constituents and control harmful emissions.

2. Heavy metals:

- a. Stabilization or Fixation. Wastes are treated in such a way that soluble heavy metals are fixed by oxidation/reduction, or by some other means which renders the metals immobile in a landfill environment.
- b. Recovery. Wastes are treated to recover the metal fraction by thermal processing, precipitation, exchange, carbon absorption, or other techniques that yield non-hazardous levels of heavy metals in



the residuals.

3. Reactives: Any treatment which changes the chemical or physical composition of a material such that it no longer exhibits the characteristic for reactivity defined in Appendix A.
4. Corrosives: Corrosive wastes as defined in Appendix A, Section A-2.C, will be neutralized to a pH value between 6.0 and 9.0. Other acceptable treatments include recovery, incineration, chemical or electrolytic oxidation, chemical reduction, or stabilization.
5. Batteries: Mercury, nickel-cadmium, lithium, and lead-acid batteries will be processed in accordance with section 6-11.I.2.a. or b. to stabilize, fix or recover heavy metals, as appropriate, and in accordance with section 6-11.I.4. to neutralize any corrosives before disposal. Lead-acid batteries that have exhausted their life cycle will be disposed of in accordance with section 6-9.F.

**6-12. Analytical samples.** Analytical samples taken to comply with the above standards will be tested using one of the following:

- A. Overseas DOD laboratories approved by the applicable service components;
- B. Laboratories authorized by Italian Regional authorities; or
- C. CONUS laboratories certified by USEPA.